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

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* 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"existing practice," and "present practice," where used to denote sentencing practice prior to guidelines, have been replaced by the term "pre-guidelines practice" and conforming tense changes have been made in §2B3.1, comment.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:

"Offense Statutory Maximum		Offense Level
(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:

"Offense Statutory Maximum		Offense Level
(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",

"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",

and inserting in lieu thereof:

"16 U.S.C. § 117c	2B1.1, 2B1.3";

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".

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".

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:

	"Loss	Increase in Level
(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:

	"Loss (Apply the Greatest)	Increase in Level
(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:

	"Loss	Increase in Level
(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:

	"Loss (Apply the Greatest)	Increase in Level
(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:

	Loss	Increase in Level
(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:

	Loss (Apply the Greatest)	Increase in Level
(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

Controlled Substances and Quantity*	Base Offense Level
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

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* 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

Controlled Substances and Quantity*		Base Offense Level
(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 Schedule I or II Opiates); — Level 12
Less than 25 G Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
Less than 250 MG of Cocaine Base;
Less than 5 G of PCP, or less than 500 MG of Pure PCP;
Less than 5 G of Methamphetamine, or less than 500 MG of Pure Methamphetamine;
Less than 50 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
Less than 2 G of Fentanyl;
Less than 500 MG of a Fentanyl Analogue;
At least 2.5 KG but less than 5 KG of Marihuana;
At least 500 G but less than 1 KG of Hashish;
At least 50 G but less than 100 G of Hashish Oil;
At least 1.25 KG but less than 2.5 KG of Schedule I or II

	Depressants or Schedule III substances; 20 KG or more of Schedule IV substances.	
(17)	At least 1 KG but less than 2.5 KG of Marihuana; 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_2P (amphetamine precursor) =	0.375 gm of cocaine/0.075 gm of heroin
1 gm of Phenylacebone/P_2P (methamphetamine precursor) =	0.833 gm of cocaine/0.167 gm of heroin",

and inserting in lieu thereof:

"1 gm Phenylacetone/P_2P (when possessed for the purpose of manufacturing methamphetamine) =	2.08 gm of cocaine/0.418 gm of heroin
1 gm Phenylacetone/P_2P (in any other case) =	0.375 gm of cocaine/0.075 gm of heroin".

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

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

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

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

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 SO_4 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".

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 marihuana less harshly than other controlled substances. This distinction is based on the statutory provisions that specifically exempt convictions for the distribution of less than five grams of marihuana from the mandatory minimum one-year imprisonment requirement.".

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:

	"Loss	Increase in Level
(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:

	"Loss (Apply the Greatest)	Increase in Level
(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 there of "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(l)(2)" immediately following "human life", and by inserting "is convicted under 49 U.S.C. § 1472(l)(2) (i.e., the defendant" immediately before "acted".

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:

	Number of Firearms	Increase in Level
(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 it 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:

	"Tax Loss	Offense Level
(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:

	"Tax Loss (Apply the Greatest)	Offense Level
(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(l)(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",

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",

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".

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:

	Degree of Bodily Injury	Increase in Level
(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 (fomerly 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/P_2P, 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 "sadomasochistic" 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(l)(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. § 136l	2Q1.2",
"18 U.S.C. § 34	2A1.1, 2A1.2, 2A1.3, 2A1.4",
"18 U.S.C. § 35(b)	2A6.1",
"18 U.S.C. § 219	2C1.3",
"18 U.S.C. § 281	2C1.3",
"18 U.S.C. § 332	2B1.1, 2F1.1",
"18 U.S.C. § 335	2F1.1",
"18 U.S.C. § 608	2H2.1",
"18 U.S.C. § 647	2B1.1",
"18 U.S.C. § 650	2B1.1",
"18 U.S.C. § 665(b)	2B3.3, 2C1.1",
"18 U.S.C. § 667	2B1.1, 2B1.2",
"18 U.S.C. § 712	2F1.1",
"18 U.S.C. § 753	2P1.1",
"18 U.S.C. § 915	2F1.1",
"18 U.S.C. § 917	2F1.1",
"18 U.S.C. § 970(a)	2B1.3, 2K1.4",

"18 U.S.C. § 1015	2F1.1, 2J1.3, 2L2.1, 2L2.2",
"18 U.S.C. § 1023	2B1.1, 2F1.1",
"18 U.S.C. § 1024	2B1.2",
"18 U.S.C. § 1031	2F1.1",
"18 U.S.C. § 1091	2H1.3",
"18 U.S.C. § 1115	2A1.4",
"18 U.S.C. § 1167	2B1.1",
"18 U.S.C. § 1168	2B1.1",
"18 U.S.C. § 1201(c), (d)	2X1.1",
"18 U.S.C. § 1364	2K1.4",
"18 U.S.C. § 1422	2C1.2, 2F1.1",
"18 U.S.C. § 1541	2L2.3",
"18 U.S.C. § 1716	2K3.2",
(felony provisions only)	
"18 U.S.C. § 1860	2R1.1",
"18 U.S.C. § 1861	2F1.1",
"18 U.S.C. § 1864	2Q1.6",
"18 U.S.C. § 1991	2A2.1, 2X1.1",
"18 U.S.C. § 1992	2A1.1, 2B1.3, 2K1.4, 2X1.1",
"18 U.S.C. § 2072	2F1.1",
"18 U.S.C. § 2118(d)	2X1.1",
"18 U.S.C. § 2197	2B5.2, 2F1.1",
"18 U.S.C. § 2232	2J1.2",
"18 U.S.C. § 2233	2B1.1, 2B3.1",
"18 U.S.C. § 2272	2F1.1",
"18 U.S.C. § 2276	2B1.3, 2B2.2",
"18 U.S.C. § 2331(a)	2A1.1, 2A1.2, 2A1.3, 2A1.4",
"18 U.S.C. § 2331(b)	2A2.1",
"18 U.S.C. § 2331(c)	2A2.2",
"22 U.S.C. § 2780	2M5.2",
"42 U.S.C. § 300i-1	2Q1.4, 2Q1.5",
"42 U.S.C. § 1973j(c)	2X1.1".

Appendix A is amended:

in the line beginning "8 U.S.C. § 1328" by deleting ", 2G2.1, 2G2.2";

in the line beginning "16 U.S.C. § 1029" by deleting ", 2Q2.2";

in the line beginning "16 U.S.C. § 1030" by deleting ", 2Q2.2";

in the line beginning "16 U.S.C. § 1857(2)" by deleting ", 2Q2.2" and inserting in lieu thereof "2Q2.1";

in the line beginning "16 U.S.C. § 1859" by deleting "2Q2.2" and inserting in lieu thereof "2Q2.1";
and in the line beginning "16 U.S.C. § 3373(d)" by deleting "2Q2.2" and inserting in lieu thereof "2Q2.1";

by deleting:

"18 U.S.C. § 32(a)(1)-(4)	2K1.4, 2B1.3
18 U.S.C. § 32(b)	2A1.1-2A2.3, 2A4.1, 2A5.1-2A5.2, 2K1.4, 2B1.3",

and inserting in lieu thereof:

"18 U.S.C. § 32(a),(b)	2A1.1-2A2.3, 2A4.1, 2A5.1, 2A5.2, 2B1.3, 2K1.4";

in the line beginning "18 U.S.C. § 33" by inserting "2A2.1, 2A2.2," immediately before ""2B1.3";

in the line beginning "18 U.S.C. § 112(a)" by inserting "2A2.1," immediately before "2A2.2," and by inserting ", 2A4.1, 2B1.3, 2K1.4" immediately following "2A2.3";

in the line beginning "18 U.S.C. § 152" by deleting "2F1.1," and by inserting ", 2F1.1, 2J1.3" immediately following "2B4.1";

in the line beginning "18 U.S.C. § 201(b)(1)" by deleting ", 2J1.3, 2J1.8, 2J1.9";

in the line beginning "18 U.S.C. § 241" by deleting "2H1.2,";

in the line beginning "18 U.S.C. § 351(d)" by deleting ", 2A2.1" and inserting in lieu thereof "2A1.5";

in the line beginning "18 U.S.C. § 371" by deleting "2A2.1" and inserting in lieu thereof "2A1.5";

in the line beginning "18 U.S.C. § 373" by deleting "2A2.1" and inserting in lieu thereof "2A1.5";

in the line beginning "18 U.S.C. § 474" by inserting ", 2B5.2" immediately following "2B5.1";

in the line beginning "18 U.S.C. § 476" by inserting ", 2B5.2" immediately following "2B5.1";

in the line beginning "18 U.S.C. § 477" by inserting ", 2B5.2" immediately following "2B5.1";

in the line beginning "18 U.S.C. § 496" by deleting "2T3.1" and inserting in lieu thereof "2F1.1, 2T3.1";

in the line beginning "18 U.S.C. § 545" by deleting "2Q2.2" and inserting in lieu thereof "2Q2.1";

in the line beginning "18 U.S.C. § 549" by inserting "2B1.1," immediately before "2T3.1", and by inserting ", 2T3.2" immediately following "2T3.1";

in the line beginning "18 U.S.C. § 551" by inserting "2J1.2," immediately before "2T3.1";

in the line beginning "18 U.S.C. § 642" by inserting ", 2B5.2" immediately following "2B5.1";

by deleting:

"18 U.S.C. § 666(a)	2B1.1, 2C1.1, 2C1.2, 2F1.1",

and inserting in lieu thereof:

"18 U.S.C. § 666(a)(1)(A)	2B1.1, 2F1.1
18 U.S.C. § 666(a)(1)(B)	2C1.1, 2C1.2
18 U.S.C. § 666(a)(1)(C)	2C1.1, 2C1.2";

in the line beginning "18 U.S.C. § 755" by deleting ", 2X2.1";

in the line beginning "18 U.S.C. § 756" by deleting ", 2X2.1";

in the line beginning "18 U.S.C. § 757" by deleting "2X2.1" and inserting in lieu thereof "2X3.1";

in the line beginning "18 U.S.C. § 793(d), (e)" by inserting "2M3.2," immediately before "2M3.3";

in the line beginning "18 U.S.C. § 842(a)" by deleting ",(h),(i)" by inserting in lieu thereof "-(i)";

in the line beginning "18 U.S.C. § 844(f)" by inserting ", 2X1.1" immediately following "2K1.4";

by deleting:

"18 U.S.C. § 922(a)(1)-(5)	2K2.3
18 U.S.C. § 922(a)(6)	2K2.1
18 U.S.C. § 922(b)(1)-(3)	2K2.3
18 U.S.C. § 922(d)	2K2.3
18 U.S.C. § 922(g)	2K2.1
18 U.S.C. § 922(h)	2K2.1
18 U.S.C. § 922(i)	2B1.2, 2K2.3
18 U.S.C. § 922(j)	2B1.2, 2K2.3
18 U.S.C. § 922(k)	2K2.3
18 U.S.C. § 922(l)	2K2.3
18 U.S.C. § 922(n)	2K2.1
18 U.S.C. § 923	2K2.3
18 U.S.C. § 924(c)	2K2.4",

and inserting in lieu thereof:

"18 U.S.C. § 922(a)(1)	2K2.1,2K2.2
18 U.S.C. § 922(a)(2)	2K2.2
18 U.S.C. § 922(a)(3)	2K2.1
18 U.S.C. § 922(a)(4)	2K2.1
18 U.S.C. § 922(a)(5)	2K2.2

18 U.S.C. § 922(a)(6)	2K2.1
18 U.S.C. § 922(b)-(d)	2K2.2
18 U.S.C. § 922(e)	2K2.1, 2K2.2
18 U.S.C. § 922(f)	2K2.1, 2K2.2
18 U.S.C. § 922(g)	2K2.1
18 U.S.C. § 922(h)	2K2.1
18 U.S.C. § 922(i)-(l)	2K2.1, 2K2.2
18 U.S.C. § 922(m)	2K2.2
18 U.S.C. § 922(n)	2K2.1
18 U.S.C. § 922(o)	2K2.1, 2K2.2
18 U.S.C. § 923(a)	2K2.2
18 U.S.C. § 924(a)(1)(A)	2K2.2
18 U.S.C. § 924(a)(1)(C)	2K2.1, 2K2.2
18 U.S.C. § 924(a)(3)(A)	2K2.2
18 U.S.C. § 924(b)	2K2.3
18 U.S.C. § 924(c)	2K2.4
18 U.S.C. § 924(f)	2K2.3
18 U.S.C. § 924(g)	2K2.3";

in the line beginning "18 U.S.C. § 1012" by inserting "2C1.3," immediately before "2F1.1";

in the line beginning "18 U.S.C. § 1028" by inserting ", 2L2.4 " immediately following "2L2.3";

in the line beginning "18 U.S.C. § 1113" by inserting ", 2A2.2" immediately following "2A2.1";

in the line beginning "18 U.S.C. § 1117" by deleting "2A2.1" and inserting in lieu thereof "2A1.5";

in the line beginning "18 U.S.C. § 1362" by inserting ", 2K1.4" immediately following "2B1.3";

in the line beginning "18 U.S.C. § "1363" by inserting ", 2K1.4" immediately following "2B1.3";

in the line beginning "18 U.S.C. § 1426" by inserting ", 2L2.2" immediately following "2L2.1";

in the line beginning "18 U.S.C. § 1460" by inserting "2G2.2," immediately before "2G3.1";

in the line beginning "18 U.S.C. § 1512(a)" by inserting "2A1.3," immediately following "2A1.2,";

in the line beginning "18 U.S.C. § 1512(b) by inserting "2A1.2," immediately before "2A2.2";

in the line beginning "18 U.S.C. § 1704" by inserting ", 2F1.1" immediately following "2B5.2";

in the line beginning "18 U.S.C. § 1751(c)" by inserting ", 2X1.1" immediately following "2A4.1";

in the line beginning "18 U.S.C. § 1751(d)" by deleting "2A2.1" and inserting in lieu thereof "2A1.5", and by inserting ", 2X1.1" immediately following "2A4.1";

in the line beginning "18 U.S.C. § 1909" by inserting "2C1.3," immediately before "2C1.4";

in the line beginning "18 U.S.C. § 1951" by deleting "2B3.1, 2B3.2, 2C1.1,";

in the line beginning "18 U.S.C. § 1952A" by deleting "2A2.1,";

in the line beginning "18 U.S.C. § 1958" by deleting "2A2.1,";

by deleting:

"18 U.S.C. § 2251 2G2.1",

and inserting in lieu thereof:

"18 U.S.C. § 2251(a), (b) 2G2.1
18 U.S.C. § 2251(c)(1)(A) 2G2.2
18 U.S.C. § 2251(c)(1)(B) 2G2.1";

in the line beginning "18 U.S.C. § 2271" by deleting "2F1.1,";

in the line beginning "18 U.S.C. § 2421" by inserting ", 2G1.2" immediately following "2G1.1";

in the line beginning "18 U.S.C. § 2422" by inserting ", 2G1.2" immediately following "2G1.1";

by deleting "18 U.S.C. § 4082(d) 2P1.1";

by deleting:

"21 U.S.C. § 333 2N2.1",

and inserting in lieu thereof:

"21 U.S.C. § 333(a)(1) 2N2.1
21 U.S.C. § 333(a)(2) 2F1.1, 2N2.1
21 U.S.C. § 333(b) 2N2.1";

by deleting:

"26 U.S.C. § 5861(a) 2K2.3
26 U.S.C. § 5861(b)-(l) 2K2.2",

and inserting in lieu thereof:

"26 U.S.C. § 5861(a) 2K2.2
26 U.S.C. § 5861(b) 2K2.1
26 U.S.C. § 5861(c) 2K2.1

26 U.S.C. § 5861(d)	2K2.1
26 U.S.C. § 5861(e)	2K2.2
26 U.S.C. § 5861(f)	2K2.2
26 U.S.C. § 5861(g)	2K2.2
26 U.S.C. § 5861(h)	2K2.1
26 U.S.C. § 5861(i)	2K2.1
26 U.S.C. § 5861(j)	2K2.1, 2K2.2
26 U.S.C. § 5861(k)	2K2.1
26 U.S.C. § 5861(l)	2K2.2";

in the line beginning "26 U.S.C. § 5871" by deleting "2K2.2, 2K2.3" and inserting in lieu thereof "2K2.1, 2K2.2";

by deleting:

"33 U.S.C. § 1319	2Q1.1, 2Q1.2, 2Q1.3",

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:

Number of Firearms	Increase in Level
(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(l)(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(l)(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(l)(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 Fenethylline =	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_2P (when possessed for the purpose of manufacturing methamphetamine) =	2.08 gm of cocaine/0.416 gm of heroin
1 gm Phenylacetone/P_2P (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 Thialbarbital =	2 mg of heroin/2 gm of marihuana
1 gm of Thiamylal =	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 =	0.0125 mg of heroin/12.5 mg of marihuana.",

and inserting in lieu thereof:

"DRUG EQUIVALENCY TABLES

Schedule 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 Fenethylline =	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_2P (when possessed for the purpose of manufacturing methamphetamine) =	416 gm of marihuana
1 gm Phenylacetone/P_2P (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-Methylenedioxymethamphetamine/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

****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

*****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",

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 (see 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",

and inserting in lieu thereof:

"31 U.S.C. § 5316	2S1.4";

by deleting:

"46 U.S.C. § App. 1903	2D1.1",

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 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).",

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 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. Defendant J is accountable for the entire single shipment of marihuana 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 marihuana 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 marihuana).

(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(l)(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(l)(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(l)(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(l)(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:

	Number of Unlawful Aliens Smuggled, Transported, or Harbored	Increase in Level
(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:

	Number of Sets of Documents	Increase in Level
(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:

	Number of Passports	Increase in Level
(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.

A crime of violence includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth in the violation charged involved use of explosives or, by its nature, presented a serious potential risk of physical injury to another. A crime of violence also includes the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

3. 'Controlled substance offense' includes any offense under a federal or state law prohibiting the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with the intent to manufacture, import, export, distribute, or dispense. A controlled substance offense also includes the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.",

and by inserting in lieu thereof:

"2. 'Crime of violence' is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1). See §4B1.2(1) and Application Notes 1 and 2 of the Commentary to §4B1.2.

3. 'Controlled substance offense' is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1). See §4B1.2(2) and Application Note 1 of the Commentary to §4B1.2.".

Reason for Amendment: This amendment clarifies the Commission's intent that the terms "crime of violence" and "controlled substance offense" in §7B1.1 have the same meaning as these terms have in §4B1.2.

Effective Date: The effective date of this amendment is November 1, 1992.

474. Amendment: Section 1B1.11(b) is amended by inserting the following additional subdivision:

"(3) If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses.".

The Commentary to §1B1.11 captioned "Application Note" is amended by inserting the following additional note:

"2. Under subsection (b)(1), the last date of the offense of conviction is the controlling date for ex post facto purposes. For example, if the offense of conviction (i.e., the conduct charged in the count of the indictment or information of which the defendant was convicted) was determined by the court to have been committed between October 15, 1991 and October 28, 1991, the date of October 28, 1991 is the controlling date for ex post facto purposes. This is true even if the defendant's conduct relevant to the determination of the guideline range under

§1B1.3 (Relevant Conduct) included an act that occurred on November 2, 1991 (after a revised Guideline Manual took effect).";

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

The Commentary to §1B1.11 captioned "Background" is amended by inserting the following additional sentence as the first sentence of the first paragraph:

"Subsections (a) and (b)(1) provide that the court should apply the Guidelines Manual in effect on the date the defendant is sentenced unless the court determines that doing so would violate the ex post facto clause in Article I, § 9 of the United States Constitution.";

and by inserting the following additional paragraphs at the end:

" Subsection (b)(2) provides that the Guidelines Manual in effect on a particular date shall be applied in its entirety.

Subsection (b)(3) provides that where the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses, even if the revised edition results in an increased penalty for the first offense. Because the defendant completed the second offense after the amendment to the guidelines took effect, the ex post facto clause does not prevent determining the sentence for that count based on the amended guidelines. For example, if a defendant pleads guilty to a single count of embezzlement that occurred after the most recent edition of the Guidelines Manual became effective, the guideline range applicable in sentencing will encompass any relevant conduct (e.g., related embezzlement offenses that may have occurred prior to the effective date of the guideline amendments) for the offense of conviction. The same would be true for a defendant convicted of two counts of embezzlement, one committed before the amendments were enacted, and the second after. In this example, the ex post facto clause would not bar application of the amended guideline to the first conviction; a contrary conclusion would mean that such defendant was subject to a lower guideline range than if convicted only of the second offense. Decisions from several appellate courts addressing the analogous situation of the constitutionality of counting pre-guidelines criminal activity as relevant conduct for a guidelines sentence support this approach. See United States v. Ykema, 887 F.2d 697 (6th Cir. 1989) (upholding inclusion of pre-November 1, 1987, drug quantities as relevant conduct for the count of conviction, noting that habitual offender statutes routinely augment punishment for an offense of conviction based on acts committed before a law is passed), cert. denied, 493 U.S. 1062 (1990); United States v. Allen, 886 F.2d 143 (8th Cir. 1989) (similar); see also United States v. Cusack, 901 F.2d 29 (4th Cir. 1990) (similar).

Moreover, the approach set forth in subsection (b)(3) should be followed regardless of whether the offenses of conviction are the type in which the conduct is grouped under §3D1.2(d). The ex post facto clause does not distinguish between groupable and nongroupable offenses, and unless that clause would be violated, Congress' directive to apply the sentencing guidelines in effect at the time of sentencing must be followed. Under the guideline sentencing system, a single sentencing range is

determined based on the defendant's overall conduct, even if there are multiple counts of conviction (see §§3D1.1-3D1.5, 5G1.2). Thus, if a defendant is sentenced in January 1992 for a bank robbery committed in October 1988 and one committed in November 1991, the November 1991 Guidelines Manual should be used to determine a combined guideline range for both counts. See generally United States v. Stephenson, 921 F.2d 438 (2d Cir. 1990) (holding that the Sentencing Commission and Congress intended that the applicable version of the guidelines be applied as a 'cohesive and integrated whole' rather than in a piecemeal fashion).

Consequently, even in a complex case involving multiple counts that occurred under several different versions of the Guidelines Manual, it will not be necessary to compare more than two manuals to determine the applicable guideline range -- the manual in effect at the time the last offense of conviction was completed and the manual in effect at the time of sentencing.".

Reason for Amendment: This amendment expands §1B1.11 to address what has become a frequently asked hotline question and troublesome application issue -- the application of amended guidelines to multiple count cases in which the effective date of guideline revision(s) occurs between the offenses of conviction. The issue has also produced litigation before several appellate courts. See United States v. Castro, 972 F.2d 1107 (9th Cir. 1992), cert. denied, 113 S. Ct. 1350 (1993); United States v. Seligsohn, 981 F.2d 1418 (3d Cir. 1992); United States v. Hartzog, 983 F.2d 604 (4th Cir. 1993). This amendment extends the Commission's "one book" rule to multiple count cases and sets forth the rationale for this policy.

Effective Date: The effective date of this amendment is November 1, 1993.

475. Amendment: Chapter One, Part B, is amended by inserting an additional policy statement as §1B1.12 (Persons Sentenced Under the Federal Juvenile Delinquency Act (Policy Statement)).

Section 5H1.1 is amended by deleting the last paragraph as follows:

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

Reason for Amendment: This amendment adds a policy statement as §1B1.12 to address the determination of the maximum imposable sentence in the case of a juvenile delinquent. The Supreme Court's decision in United States v. R.L.C., 112 S. Ct. 1329 (1992), requires calculation of the guideline range in order to determine the maximum sentence imposable on a juvenile delinquent.

Effective Date: The effective date of this amendment is November 1, 1993.

476. Amendment: The Commentary to §2A1.1 captioned "Background" is deleted as follows:

"Background: The maximum penalty authorized by 18 U.S.C. § 1111 for first degree murder is death or life imprisonment. 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)).

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: This amendment deletes commentary that highlighted the question of whether 18 U.S.C. § 1111 provides a mandatory minimum term of life imprisonment. Since this commentary was written, appellate courts uniformly have held that 18 U.S.C. § 1111 does provide a mandatory minimum term of life imprisonment. See United States v. Sands, 968 F.2d 1058 (10th Cir. 1992), cert. denied, 113 S. Ct. 987 (1993); United States v. LaFleur, 952 F.2d 1537 (9th Cir), modfied and reh'g denied, 971 F.2d 200 (9th Cir. 1991); United States v. Gonzalez, 922 F.2d 1044 (2d Cir.), cert. denied, 112 S. Ct. 660 (1991); United States v. Donley, 878 F.2d 735 (3d Cir. 1989), cert. denied, 494 U.S. 1058 (1990). In addition, this amendment deletes, as unnecessary, several sentences of commentary that merely recite statutory penalties.

Effective Date: The effective date of this amendment is November 1, 1993.

477. Amendment: Section 2A3.1 is amended by redesignating subsection (c) as subsection (d); and by inserting the following additional subsection:

"(c) Cross Reference

(1) If a 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).".

Section 2A3.1(b)(2) is amended by deleting "otherwise, (B) if the victim was under the age of sixteen" and inserting in lieu thereof "or (B) if the victim had attained the age of twelve years but had not attained the age of sixteen years".

The Commentary to §2A3.1 captioned "Application Notes" is amended by inserting the following additional note:

"5. If the defendant was convicted (A) of more than one act of criminal sexual abuse and the counts are grouped under §3D1.2 (Groups of Closely Related Counts), or (B) of only one such act but the court determines that the offense involved multiple acts of criminal sexual abuse of the same victim or different victims, an upward departure would be warranted.".

Reason for Amendment: This amendment adds a cross reference to §2A3.1 to address the circumstance in which a victim is murdered during the offense. In addition, an editorial change in §2A3.1(b)(2) is made to conform the phraseology used in this subsection to that used elsewhere in the guidelines. This amendment also authorizes an upward departure where the offense involved multiple acts of criminal sexual abuse that do not result in an increase in

offense level under the multiple count rules in Chapter Three, Part D.

Effective Date: The effective date of this amendment is November 1, 1993.

478. Amendment: The Commentary to §2A4.1 captioned "Background" is amended in the third paragraph by deleting:

> "or to facilitate the commission of another offense. Should the application of this guideline result in a penalty less than the result achieved by applying the guideline for the underlying offense, apply the guideline for the underlying offense (e.g., §2A3.1, Criminal Sexual Abuse).",

and inserting in lieu thereof:

> "(subsection (b)(1)) or involves another federal, state, or local offense that results in a greater offense level (subsections (b)(7) and (c)(1)).".

The Commentary to §2K1.3 captioned "Application Notes" is amended in Note 4 by inserting "(federal, state, or local)" immediately following "any offense".

The Commentary to §2K1.3 captioned "Application Notes" is amended in Note 8 by inserting "(which may be a federal, state, or local offense)" immediately before "is".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 7 by inserting "(federal, state, or local)" immediately following "any offense".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 14 by inserting "(which may be a federal, state, or local offense)" immediately before "is".

The Commentary to §2K2.1 captioned "Application Notes" is amended by inserting the following additional note:

> "19. The enhancement under subsection (b)(4) for a stolen firearm or a firearm with an altered or obliterated serial number applies whether or not the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number.".

Reason for Amendment: This amendment clarifies that the terms "another offense" and "other offense" in §2A4.1(b)(7), and "felony offense," "another felony offense," "another offense," and "other offense" in §§2K1.3 and 2K2.1, refer to federal, state, or local offenses. In addition, this amendment clarifies that the enhancement in §2K2.1(b)(4) applies whether or not the defendant knew or had reason to believe the firearm was stolen or had an altered or obliterated serial number.

Effective Date: The effective date of this amendment is November 1, 1993.

479. Amendment: Section 2A4.2 is amended by inserting the following additional subsection:

"(b) Cross Reference

(1) If the defendant was a participant in the kidnapping offense, apply §2A4.1 (Kidnapping; Abduction; Unlawful Restraint).".

The Commentary to §2A4.2 is amended by inserting the following immediately before "Background".

"Application Note:

1. A 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted.".

Section 2B3.2(c) is amended by deleting "Reference" and inserting in lieu thereof "References"; by renumbering subdivision (1) as subdivision (2); and by inserting the following additional subdivision:

"(1) If a 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).".

Section 2B3.3 is amended by inserting the following additional subsection:

"(c) Cross References

(1) If the offense involved extortion under color of official right, apply §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right).

(2) If the offense involved extortion by force or threat of injury or serious damage, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).".

Section 2D1.1 is amended by inserting the following additional subsection:

"(d) Cross Reference

(1) If a 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).".

Section 2E2.1 is amended by inserting the following additional subsection:

"(c) Cross Reference

(1) If a 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).".

Reason for Amendment: This amendment adds a cross reference to §2A4.2 to address the circumstance in which the defendant was a participant in the underlying kidnapping offense. This amendment also adds cross references to §§2B3.2, 2D1.1, and 2E2.1 to address the circumstance in which a victim is murdered during the offense. Finally, this amendment adds cross references to §2B3.3 to ensure the selection of the appropriate guideline.

Effective Date: The effective date of this amendment is November 1, 1993.

480. Amendment: Section 2A5.2(a)(1) is amended by deleting "defendant intentionally endangered" and inserting in lieu thereof "offense involved intentionally endangering".

Section 2A5.2(a)(2) is amended by deleting "defendant recklessly endangered" and inserting in lieu thereof "offense involved recklessly endangering".

Section 2A6.1(b)(1) is amended by deleting "defendant engaged in" and inserting in lieu thereof "offense involved".

Section 2A6.1(b)(2) is amended by deleting "the defendant's conduct" and inserting in lieu thereof "the offense".

Reason for Amendment: This amendment deletes language that could be construed as a limitation on the scope of conduct for which a defendant is accountable under §1B1.3 (Relevant Conduct) and replaces it with language consistent with that used in other offense guidelines.

Effective Date: The effective date of this amendment is November 1, 1993.

481. Amendment: Section 2B1.1 is amended in the title by inserting "; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property" at the end thereof.

Section 2B1.1(b)(2) is amended by inserting "(A)" immediately following "If"; and by inserting "or the taking of such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, or controlled substance," immediately following "taken,".

Section 2B1.1(b)(4) is amended by inserting "(A)" immediately following "If"; and by inserting "or the taking of such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail," immediately following "taken,".

Section 2B1.1(b)(5) is amended by inserting "(A)" immediately before "If"; and by inserting "; or (B) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 4 levels." immediately following "levels".

The Commentary to §2B1.1 captioned "Statutory Provisions" is amended by inserting "553(a)(1)," immediately following "225,"; by inserting "662, 664," immediately before "1702"; and by deleting ", 2317" and inserting in lieu thereof "-2317; 29 U.S.C. § 501(c)".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 2 by inserting the following additional paragraph as the next to the last paragraph:

"In stolen property offenses (receiving, transporting, transferring, transmitting, or possessing stolen property), the loss is the value of the stolen property determined as in a theft offense.".

The Commentary to §2B1.1 captioned "Application Notes" is amended by inserting the following additional note:

"14. If the offense involved theft or embezzlement from an employee pension or welfare benefit plan (a violation of 18 U.S.C. § 664) and the defendant was a fiduciary of the benefit plan, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply. '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.

If the offense involved theft or embezzlement from a labor union (a violation of 29 U.S.C. § 501(c)) and 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), an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply.".

The Commentary to §2B1.1 captioned "Background" is amended in the first paragraph by deleting "property taken" and inserting in lieu thereof "the property stolen"; by deleting "theft offenses," and inserting in lieu thereof "theft and other offenses involving stolen property"; and by deleting "loss from the theft" and inserting in lieu thereof "loss".

Section 2B1.2 is deleted in its entirety as follows:

"§2B1.2. Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property

(a) Base Offense Level: 4

(b) Specific Offense Characteristics

(1) If the value of the stolen property exceeded $100, increase by the corresponding number of levels from the table in §2B1.1.

(2) If the property included a firearm, destructive device, or controlled substance, increase by 1 level; but if the resulting offense level is less than 7, increase to 7.

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

(4) (A) If the offense was committed by a person in the business of receiving and selling stolen property, increase by 4 levels; or

(B) If the offense involved more than minimal planning, increase by 2 levels.

(5) If the offense involved an organized scheme to receive stolen vehicles or vehicle parts, and the offense level as determined above is less than level 14, increase to level 14.

Commentary

Statutory Provisions: 18 U.S.C. §§ 553(a)(1), 659, 662, 1708, 2312-2317. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. 'More than minimal planning,' 'firearm,' and 'destructive device' are defined in the Commentary to §1B1.1 (Application Instructions).

2. Valuation of property is discussed in the Commentary to §2B1.1.

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).

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).

Background: The treatment accorded receiving stolen property parallels that given theft. Persons who receive stolen property for resale receive a sentence enhancement because the amount of property is likely to underrepresent the scope of their criminality and the extent to which they encourage or facilitate other crimes.".

Section 2B2.1 is amended in the title by inserting "or a Structure Other than a Residence" at the end thereof.

Section 2B2.1(a) is amended by deleting "Base Offense Level: 17" and inserting in lieu thereof:

"Base Offense Level:

(1) 17, if a residence; or

(2) 12, if a structure other than a residence.".

The Commentary to §2B2.1 captioned "Statutory Provision" is amended by deleting "Provision: 18 U.S.C. § 1153" and inserting in lieu thereof "Provisions: 18 U.S.C. §§ 1153, 2113(a), 2115, 2117, 2118(b). For additional statutory provision(s), see Appendix A (Statutory Index)".

Section 2B2.2 is deleted in its entirety as follows:

"§2B2.2. Burglary of Other Structures

(a) Base Offense Level: 12

(b) Specific Offense Characteristics

(1) If the offense involved more than minimal planning, increase by 2 levels.

(2) If the loss exceeded $2,500, increase by the corresponding number of levels from the table in §2B2.1.

(3) If a firearm, destructive device, or controlled substance was taken, or if the taking of such item was an object of the offense, increase by 1 level.

(4) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2113(a), 2115, 2117, 2118(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. 'More than minimal planning,' 'firearm,' 'destructive device,' and 'dangerous weapon' are defined in the Commentary to §1B1.1 (Application Instructions).

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

3. Subsection (b)(4) does not apply to possession of a dangerous weapon (including a firearm) that was stolen during the course of the offense.

Background: The offense level for burglary is significantly higher than that for theft for low losses, but is approximately the same for very high losses. Weapon possession, but not use, is a specific offense characteristic because use of a weapon (including to threaten) ordinarily would make the offense robbery. Weapon use would be a ground

for upward departure.".

Chapter Two, Part B, Subpart 5 is amended in the title by deleting ", FORGERY," immediately before "AND".

Section 2B5.2 is deleted in its entirety as follows:

"§2B5.2. Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

Apply §2F1.1 (Fraud and Deceit).

Commentary

Statutory Provisions: 18 U.S.C. §§ 471-473, 500, 510, 1003, 2314, 2315. For additional statutory provision(s), see Appendix A (Statutory Index).".

Section 2B5.3 is amended in the title by inserting "or Trademark" at the end thereof.

The Commentary to §2B5.3 captioned "Statutory Provisions" is amended by deleting "2319" and inserting in lieu thereof "2318-2320".

The Commentary to §2B5.3 captioned "Background" is amended in the first paragraph by inserting "and trademark" immediately following "copyright".

Section 2B5.4 is deleted in its entirety as follows:

"§2B5.4. Criminal Infringement of Trademark

(a) Base Offense Level: 6

(b) Specific Offense Characteristic

(1) If the retail value of the infringing items exceeded $2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).

Commentary

Statutory Provisions: 18 U.S.C. §§ 2318, 2320.

Background: The Commission concluded that trademark infringement is roughly comparable to copyright infringement.".

Section 2D3.2 is amended in the title by deleting "Manufacture of Controlled Substance in Excess of or Unauthorized by Registration Quota; Attempt or Conspiracy" and inserting in lieu thereof "Regulatory Offenses Involving Controlled Substances; Attempt or Conspiracy".

The Commentary to §2D3.2 captioned "Statutory Provisions" is amended by deleting "842(b),

843(a)(3)" and inserting in lieu thereof "842(a)(2), (9), (10), (b), 954, 961".

The Commentary to §2D3.2 captioned "Background" is amended by deleting "This offense is a misdemeanor" and inserting in lieu thereof "These offenses are misdemeanors".

Sections 2D3.3, 2D3.4, and 2D3.5 are deleted in their entirety as follows:

"§2D3.3. Illegal Use of Registration Number to Distribute or Dispense a Controlled Substance to Another Registrant or Authorized Person; Attempt or Conspiracy

(a) Base Offense Level: 4

Commentary

Statutory Provision: 21 U.S.C. § 842(a)(2).

Background: This offense is a misdemeanor. The maximum term of imprisonment authorized by statute is one year.

§2D3.4. Illegal Transfer or Transshipment of a Controlled Substance; Attempt or Conspiracy

(a) Base Offense Level: 4

Commentary

Statutory Provisions: 21 U.S.C. §§ 954, 961.

Background: This offense is a misdemeanor. The maximum term of imprisonment authorized by statute is one year.

§2D3.5. Violation of Recordkeeping or Reporting Requirements for Listed Chemicals and Certain Machines; Attempt or Conspiracy

(a) Base Offense Level: 4

Commentary

Statutory Provisions: 21 U.S.C. § 842(a)(9), (10).".

Section 2E1.5 is deleted in its entirety as follows:

"§2E1.5. Hobbs Act Extortion or Robbery

Apply §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), as applicable.

Commentary

Statutory Provision: 18 U.S.C. § 1951.".

Section 2E3.1 is amended in the title by deleting "Engaging in a Gambling Business" and inserting in lieu thereof "Gambling Offenses".

Section 2E3.1(a) is amended by deleting "12" and inserting in lieu thereof:

"(1) 12, if the offense was (A) engaging in a gambling business; (B) transmission of wagering information; or (C) committed as part of, or to facilitate, a commercial gambling operation; or

(2) 6, otherwise.".

The Commentary to §2E3.1 captioned "Statutory Provision" is amended by deleting "Provision: 18 U.S.C. § 1955" and inserting in lieu thereof "Provisions: 15 U.S.C. §§ 1172-1175; 18 U.S.C. §§ 1082, 1301-1304, 1306, 1511, 1953, 1955. For additional statutory provision(s), see Appendix A (Statutory Index)".

Sections 2E3.2 and 2E3.3 are deleted in their entirety as follows:

"§2E3.2. Transmission of Wagering Information

(a) Base Offense Level: 12

Commentary

Statutory Provision: 18 U.S.C. § 1084.

§2E3.3. Other Gambling Offenses

(a) Base Offense Level: 6

(b) Specific Offense Characteristic

(1) If the offense is committed as part of, or to facilitate, a commercial gambling operation, increase by 6 levels.

Commentary

Statutory Provisions: 15 U.S.C. §§ 1172-1175; 18 U.S.C. §§ 1082, 1301-1304, 1306, 1511, 1953. For additional statutory provision(s), see Appendix A (Statutory Index).

Background: This section includes a wide variety of conduct. A specific offense characteristic has been included to distinguish commercial from other gambling offenses.".

Section 2E5.1 is amended in the title by inserting "; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations" at the end thereof.

Section 2E5.1(b)(1) is amended by inserting "or labor organization" immediately following "plan".

The Commentary to §2E5.1 captioned "Statutory Provision" is amended by deleting "Provision: 18 U.S.C. § 1954" and inserting in lieu thereof "Provisions: 18 U.S.C. § 1954; 29 U.S.C. § 186".

The Commentary to §2E5.1 captioned "Background" is amended by inserting ", or labor organizations" immediately following "plans"; and by deleting the last sentence as follows:

> "A more severe penalty is warranted in a bribery where the payment is the primary motivation for an action to be taken, as opposed to graft, where the prohibited payment is given because of a person's actions, duties, or decisions without a prior understanding that the recipient's performance will be directly influenced by the gift.".

Section 2E5.2 is deleted in its entirety as follows:

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

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

Commentary

Statutory Provision: 18 U.S.C. § 664.

Application Note:

1. In the case of a defendant who was a fiduciary of the benefit plan, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply. '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.

Background: This section covers theft or conversion from employee benefit plans by fiduciaries, or by any person, including borrowers to whom loans are disbursed based upon materially defective loan applications, service providers who are paid on inflated billings, and beneficiaries paid as the result of fraudulent claims.".

Section 2E5.3 is amended in the title by inserting "; Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act" at the end thereof.

Section 2E5.3(a)(2) is amended by deleting "relating to the operation of an employee benefit plan, apply §2E5.2" and inserting in lieu thereof ", apply §2B1.1".

The Commentary to §2E5.3 captioned "Statutory Provision" is amended by deleting "Provision: 18 U.S.C. § 1027" and inserting in lieu thereof "Provisions: 18 U.S.C. § 1027; 29 U.S.C. §§ 439, 461, 1131. For additional statutory provision(s), see Appendix A (Statutory Index)".

The Commentary to §2E5.3 captioned "Background" is amended by inserting the following additional sentence as the second sentence:

"It also covers failure to maintain proper documents required by the LMRDA or falsification of such documents.".

Sections 2E5.4, 2E5.5, and 2E5.6 are deleted in their entirety as follows:

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

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

Commentary

Statutory Provision: 29 U.S.C. § 501(c).

Application Note:

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.

Background: This section includes embezzlement or theft from a labor organization. It is directed at union officers and persons employed by a union.

§2E5.5. Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act

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

(1) 6; or

(2) If the offense was committed to facilitate or conceal a theft or embezzlement, or an offense involving a bribe or gratuity, apply §2E5.4 or §2E5.6, as applicable.

Commentary

Statutory Provisions: 29 U.S.C. §§ 439, 461. For additional statutory provision(s), see Appendix A (Statutory Index).

Background: This section covers failure to maintain proper documents required by the LMRDA or falsification of such documents. This offense is a misdemeanor.

§2E5.6. Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations

(a) Base Offense Level:

(1) 10, if a bribe; or

(2) 6, if a gratuity.

(b) Specific Offense Characteristic

(1) Increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater.

(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.

Commentary

Statutory Provision: 29 U.S.C. § 186.

Application Notes:

1. 'Bribe' refers to the offer or acceptance of an unlawful payment with the specific understanding that it will corruptly affect an official action of the recipient.

2. 'Gratuity' refers to the offer or acceptance of an unlawful payment other than a bribe.

3. 'Value of the improper benefit to the payer' is explained in the Commentary to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right).".

Section 2F1.1 is amended in the title by inserting "; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States" at the end thereof.

The Commentary to §2F1.1 captioned "Statutory Provisions" is amended by inserting "471-473,

500, 510," immediately following "289,"; and by inserting ", 2314, 2315" immediately following "1344".

Section 2J1.3 is amended in the title by inserting "; Bribery of Witness" at the end thereof.

Section 2J1.3(b)(2) is amended by deleting "perjury or subornation of perjury" and inserting in lieu thereof "perjury, subornation of perjury, or witness bribery".

Section 2J1.3(c)(1) is amended by deleting "perjury or subornation of perjury" and inserting in lieu thereof "perjury, subornation of perjury, or witness bribery".

The Commentary to §2J1.3 captioned "Statutory Provisions" is amended by inserting "201 (b)(3), (4)," immediately before "1621".

The Commentary to §2J1.3 captioned "Application Notes" is amended in Note 3 by inserting ", subornation of perjury, or witness bribery" immediately following "perjury".

The Commentary to §2J1.3 captioned "Background" is amended by deleting "perjury and subornation of perjury" and inserting in lieu thereof "perjury, subornation of perjury, and witness bribery".

Section 2J1.8 is deleted in its entirety as follows:

"§2J1.8. Bribery of Witness

(a) Base Offense Level: 12

(b) Specific Offense Characteristic

(1) If the offense resulted in substantial interference with the administration of justice, increase by 3 levels.

(c) Cross Reference

(1) If the offense involved bribery of a witness in respect to a criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 201(b)(3), (4).

Application Notes:

1. 'Substantial interference with the administration of justice' includes a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court

resources.

2. For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply, unless the defendant obstructed the investigation or trial of the witness bribery count.

3. In the event that the defendant is convicted under this section as well as for the underlying offense (i.e., the offense with respect to which the bribery occurred), see the Commentary to Chapter Three, Part C (Obstruction), and to §3D1.2(c) (Groups of Closely Related Counts).

Background: This section applies to witness bribery. The offense levels correspond to those for perjury (§2J1.3).".

Section 2K1.1 is amended in the title by inserting "; Improper Storage of Explosive Materials" at the end thereof.

The Commentary to §2K1.1 captioned "Statutory Provisions" is amended by deleting "842(k), 844(b)" and inserting in lieu thereof "842(j), (k), 844(b). For additional statutory provision(s), see Appendix A (Statutory Index)".

Section 2K1.2 is deleted in its entirety as follows:

"§2K1.2. Improper Storage of Explosive Materials

(a) Base Offense Level: 6

Commentary

Statutory Provision: 18 U.S.C. § 842(j). For additional statutory provision(s), see Appendix A (Statutory Index).

Background: The above-referenced provision is a misdemeanor. The maximum term of imprisonment authorized by statute is one year.".

Section 2K1.7 is deleted in its entirety as follows:

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

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

(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.

Commentary

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

Application Notes:

1. The statute requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.

2. Imposition of a term of supervised release is governed by the provisions of §5D1.1 (Imposition of a Term of Supervised Release).

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.".

Section 2K2.4 is amended in the title by deleting "Firearms or Armor-Piercing Ammunition" and inserting in lieu thereof "Firearm, Armor-Piercing Ammunition, or Explosive".

Section 2K2.4(a) is amended by deleting "§ 924(c)" and inserting in lieu thereof "§ 844(h), § 924(c),".

The Commentary to §2K2.4 captioned "Statutory Provisions" is amended by inserting "844(h)," immediately before "924(c)".

The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 2 in the first paragraph by deleting "a firearm" and inserting in lieu thereof "an explosive or firearm"; and by deleting the comma immediately following "(Robbery))".

The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 4 by deleting "§ 924(c)" wherever it occurs and inserting in lieu thereof in each instance "§ 844(h), § 924(c),".

The Commentary to §2K2.4 captioned "Background" is amended by deleting "924(c)" and

inserting in lieu thereof "844(h), 924(c),"; and by inserting "explosive or" immediately before "firearm".

Chapter Two, Part K, Subpart 3 is amended in the title by deleting "TRANSPORTATION OF HAZARDOUS MATERIALS" and inserting in lieu thereof "MAILING INJURIOUS ARTICLES".

Section 2K3.1 is deleted in its entirety as follows:

"§2K3.1. Unlawfully Transporting Hazardous Materials in Commerce

Apply the guideline provision for §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification).

Commentary

Statutory Provision: 49 U.S.C. § 1809(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Background: This conduct involves the same risks as the conduct covered under §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification). Accordingly, that guideline applies.".

Section 2L2.1 is amended in the title by deleting "Documents" and inserting in lieu thereof "a Document"; and by inserting ", or a United States Passport" immediately following "Status".

Section 2L2.1(b)(2) is amended by inserting "or passports" immediately following "documents"; and by inserting "/Passports" immediately following "Documents".

The Commentary to §2L2.1 captioned "Statutory Provisions" is amended by inserting "1542, 1544," immediately following "1427,".

The Commentary to §2L2.1 captioned "Application Notes" is amended in Note 2 by deleting "set as one document" and inserting in lieu thereof "documents as one set".

Section 2L2.2 is amended in the title by inserting "; Fraudulently Acquiring or Improperly Using a United States Passport" at the end thereof.

The Commentary to §2L2.2 captioned "Statutory Provisions" is amended by inserting "1542-1544," immediately before "1546.".

Sections 2L2.3 and 2L2.4 are deleted in their entirety as follows:

"§2L2.3. Trafficking in a United States Passport

(a) Base Offense Level: 9

(b) Specific Offense Characteristics

(1) If the defendant committed the offense other than for profit, decrease by 3 levels.

(2) If the offense involved six or more passports, increase as follows:

	Number of Passports	Increase in Level
(A)	6-24	add 2
(B)	25-99	add 4
(C)	100 or more	add 6.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1542, 1544. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. 'For profit' means for financial gain or commercial advantage.

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

(a) Base Offense Level: 6

(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.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1543, 1544. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. For the purposes of Chapter Three, Part D (Multiple Counts), a conviction for unlawfully entering or remaining in the United States (§2L1.2) arising from the same course of conduct is treated as a closely related count, and is therefore grouped with an offense covered by this guideline.".

Section 2M2.1 is amended in the title by inserting ", or Production of Defective," immediately following "Destruction of".

The Commentary to §2M2.1 captioned "Statutory Provisions" is amended by inserting ", 2154" immediately following "2153".

Section 2M2.2 is deleted in its entirety as follows:

"§2M2.2. Production of Defective War Material, Premises, or Utilities

(a) Base Offense Level: 32

Commentary

Statutory Provision: 18 U.S.C. § 2154.".

Section 2M2.3 is amended in the title by inserting ", or Production of Defective," immediately following "Destruction of".

The Commentary to §2M2.3 captioned "Statutory Provisions" is amended by inserting ", 2156" immediately following "2155".

Section 2M2.4 is deleted in its entirety as follows:

"§2M2.4. Production of Defective National Defense Material, Premises, or Utilities

(a) Base Offense Level: 26

Commentary

Statutory Provision: 18 U.S.C. § 2156.".

Section 2M3.3 is amended in the title by inserting "; Disclosure of Classified Cryptographic Information; Unauthorized Disclosure to a Foreign Government or a Communist Organization of Classified Information by Government Employee; Unauthorized Receipt of Classified Information" at the end thereof.

Section 2M3.3(a)(1) is amended by deleting "was transmitted" immediately following "information".

The Commentary to §2M3.3 captioned "Statutory Provisions" is amended by deleting ". For additional statutory provision(s), see Appendix A (Statutory Index)" and inserting in lieu thereof ", 798; 50 U.S.C. § 783(b), (c)".

The Commentary to §2M3.3 captioned "Background" is amended by inserting the following additional paragraph at the end:

" This section also covers statutes that proscribe the disclosure of classified information concerning cryptographic or communication intelligence to the detriment of the United States or for the benefit of a foreign government, the unauthorized disclosure to a foreign government or a communist organization of classified information by a government employee, and the unauthorized receipt of classified information.".

Sections 2M3.6, 2M3.7, and 2M3.8 are deleted in their entirety as follows:

"§2M3.6. Disclosure of Classified Cryptographic Information

(a) Base Offense Level:

(1) 29, if top secret information was disclosed; or

(2) 24, otherwise.

Commentary

Statutory Provision: 18 U.S.C. § 798.

Application Note:

1. See Commentary to §2M3.1.

Background: The statute covered in this section proscribes the disclosure of classified information concerning cryptographic or communication intelligence to the detriment of the United States or for the benefit of a foreign government.

§2M3.7. Unauthorized Disclosure to Foreign Government or a Communist Organization of Classified Information by Government Employee

(a) Base Offense Level:

(1) 29, if top secret information was disclosed; or

(2) 24, otherwise.

Commentary

Statutory Provision: 50 U.S.C. § 783(b).

Application Note:

1. See Commentary to §2M3.1.

§2M3.8. Receipt of Classified Information

(a) Base Offense Level:

(1) 29, if top secret information was received; or

(2) 24, otherwise.

Commentary

Statutory Provision: 50 U.S.C. § 783(c).

Application Note:

1. See Commentary to §2M3.1.".

Section 2Q1.2 is amended in the title by inserting "; Unlawfully Transporting Hazardous Materials in Commerce" at the end thereof.

The Commentary to §2Q1.2 captioned "Statutory Provisions" is amended by inserting "; 49 U.S.C. § 1809(b)" immediately following "1822(b)".

Reason for Amendment: This amendment deletes 25 offense guidelines by consolidating them with other offense guidelines that cover similar offense conduct and have identical or very similar base offense levels and adjustments. Consolidation of offense guidelines in this manner has a number of practical advantages: it shortens and simplifies the Guidelines Manual and reduces the likelihood of inconsistency in phraseology and definitions from section to section; it will reduce possible confusion and litigation as to which guideline applies to particular conduct; it will reduce the number of conforming amendments required whenever similar sections are amended; and it will aid the development of case law because cases involving similar or identical concepts and definitions can be referenced under one guideline rather than different guidelines.

Effective Date: The effective date of this amendment is November 1, 1993.

482. Amendment: The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 2 by inserting the following additional sentence as the fourth sentence of the first paragraph:

"Loss does not include the interest that could have been earned had the funds not been stolen.";

and by inserting the following additional paragraphs as the second and third paragraphs:

"Where the offense involved making a fraudulent loan or credit card application, or other unlawful conduct involving a loan or credit card, the loss is to be determined under the principles set forth in the Commentary to §2F1.1 (Fraud and Deceit).

In certain cases, an offense may involve a series of transactions without a corresponding increase in loss. For example, a defendant may embezzle $5,000 from a bank and conceal this embezzlement by shifting this amount from one account to another in a series of nine transactions over a six-month period. In this example, the loss is $5,000 (the amount taken), not $45,000 (the sum of the nine transactions), because the additional transactions did not increase the actual or potential loss.".

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

"3. The loss need not be determined with precision, and may be inferred from any reasonably reliable information available, including the scope of the operation.",

and inserting in lieu thereof:

"3. 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 upon the approximate number of victims and the average loss to each victim, or on more general factors such as the scope and duration of the offense.".

The Commentary to §2B5.3 is amended by inserting the following immediately before "Background":

"Application Note:

1. 'Infringing items' means the items that violate the copyright or trademark laws (not the legitimate items that are infringed upon).".

The Commentary to §2B6.1 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. The 'corresponding number of levels from the table in §2F1.1 (Fraud and Deceit),' as used in subsection (b)(1), refers to the number of levels corresponding to the retail value of the motor vehicles or parts involved.".

Section 2F1.1(b)(3) is amended by deleting "or process" and by inserting in lieu thereof ", or process not addressed elsewhere in the guidelines".

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 5 in the first sentence by inserting a comma immediately following "decree"; and by inserting the following additional sentence at the end:

"This subsection does not apply to conduct addressed elsewhere in the guidelines; e.g., a violation of a condition of release (addressed in §2J1.7 (Offense Committed While on Release)) or a violation of probation (addressed in §4A1.1 (Criminal History Category)).".

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 7(b) in the second paragraph by inserting the following additional sentence at the end:

"Where the loss determined above significantly understates or overstates the seriousness of the defendant's conduct, an upward or downward departure may be warranted.".

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 10 by deleting "the primary" and inserting in lieu thereof "a primary"; by inserting "; or the fraud caused or risked reasonably foreseeable, substantial non-monetary harm" immediately following "was non-monetary"; by deleting "physical or psychological harm" and inserting in lieu thereof "reasonably foreseeable, physical or psychological harm or severe emotional trauma"; by deleting the period immediately following "institution" and inserting in lieu thereof a semicolon; by inserting a new subdivision, immediately following subdivision (e), as follows:

"(f) the offense involved the knowing endangerment of the solvency of one or more victims.";

and by inserting the following additional sentence at the end of the last paragraph:

"In such cases, a downward departure may be warranted.".

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 11 by deleting the last two sentences as follows:

"The statutes provide for increased maximum terms of imprisonment for the use or possession of device-making equipment and the production or transfer of more than five identification documents or fifteen access devices. The court may find it appropriate to enhance the sentence for violations of these statutes in a manner similar to the treatment of analogous counterfeiting offenses under Part B of this Chapter.",

and inserting in lieu thereof:

"Where the primary purpose of the offense involved the unlawful production, transfer, possession, or use of identification documents for the purpose of violating, or assisting another to violate, the laws relating to naturalization, citizenship, or legal resident status, apply §2L2.1 or §2L2.2, as appropriate, rather than §2F1.1. In the case of an offense involving false identification documents or access devices, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct.".

Reason for Amendment: This amendment makes the definitions of loss in §§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) and 2F1.1 (Fraud and Deceit) more consistent. Although the term "reasonably reliable information" is deleted from §2B1.1 (there is no corresponding term in §2F1.1), no substantive change results because the reliability of the information considered in respect to all cases is already addressed in §6A1.3 (Resolution of Disputed Factors). In addition, this amendment provides additional guidance for the determination of loss in cases that are referenced to §2B1.1, but have loss characteristics closely resembling offenses referenced to §2F1.1, and in cases in which simply adding the amounts from a series of transactions does not reflect the amount taken or put at risk. This amendment also clarifies the meaning of the term "infringing items" in §2B5.3, and expressly provides that the reference in §2B6.1 to the table in §2F1.1 is to be applied using the retail value of the stolen parts. In addition, this amendment clarifies the operation of §2F1.1(b)(3) to avoid inappropriate double counting. Finally, this amendment revises the Commentary to §2F1.1 by expanding Application Note 10 to provide guidance in cases in which the monetary loss does not adequately reflect the seriousness of the offense, and by clarifying Application

Note 11 and conforming the phraseology in this application note to that used elsewhere in the guidelines.

Effective Date: The effective date of this amendment is November 1, 1993.

483. Amendment: Section 2B3.1(b)(1) is amended by inserting "(A)" immediately following "If"; and by inserting "or (B) the offense involved carjacking," immediately before "increase".

Section 2B3.1 is amended by inserting the following additional subsection:

"(c) Cross Reference

(1) If a 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 §2B3.1 captioned "Statutory Provisions" is amended by inserting ", 2119" immediately following "2118(a)".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 1 by inserting the following additional paragraph at the end:

"'Carjacking' means the taking or attempted taking of a motor vehicle from the person or presence of another by force and violence or by intimidation.".

The Commentary to §2B3.1 captioned "Application Notes" is amended by deleting Note 6 as follows:

"6. If the defendant was convicted under 18 U.S.C. § 2113(e) and in committing the offense or attempting to flee or escape, a participant killed any person, apply §2A1.1 (First Degree Murder). Otherwise, if death results, see Chapter Five, Part K (Departures).";

and by renumbering Note 7 as Note 6.

Reason for Amendment: This amendment adds a specific offense characteristic for carjacking to §2B3.1, references 18 U.S.C. § 2119 (carjacking offenses) to this guideline, and adds a cross reference to this guideline to address the circumstance in which a victim is murdered during the offense.

Effective Date: The effective date of this amendment is November 1, 1993.

484. Amendment: The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 1 by deleting "21 U.S.C. § 841." and inserting in lieu thereof:

"21 U.S.C. § 841, except as expressly provided. Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.

An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in

an unusually sophisticated manner in order to avoid detection.".

Reason for Amendment: This amendment addresses an inter-circuit conflict regarding the meaning of the term "mixture or substance," as used in §2D1.1 by expressly providing that this term does not include portions of a drug mixture that have to be separated from the controlled substance before the controlled substance can be used. This issue has arisen, subsequent to the United States Supreme Court decision in Chapman v. United States, 111 S. Ct. 1919 (1991), in two types of cases. The first type of case involves a controlled substance bonded to, or suspended in, another substance (e.g., cocaine mixed with beeswax); however, the controlled substance is not usable until it is separated from the other substance. See, e.g., United States v. Mahecha-Onofre, 936 F.2d 623 (1st Cir.), cert. denied, 112 S. Ct. 648 (1991); United States v. Restrepo-Contreras, 942 F.2d 96 (1st Cir. 1991), cert. denied, 112 S. Ct. 955 (1992). The second type of case involves the waste produced from an illicit laboratory used to manufacture a controlled substance or chemicals confiscated before the chemical processing of the controlled substance is completed. The waste product is typically water or chemicals used to either remove impurities or form a precipitate (the precipitate, in some cases, being the controlled substance). Typically, a small amount of controlled substance remains in the waste water; often this amount is too small to quantify and is listed as a trace amount (no weight given) in DEA reports. In these types of cases, the waste product is not consumable. The chemicals seized before the end of processing are also not usable in that form because further processing must take place before they can be used. See, e.g., United States v. Sherrod, 964 F.2d 1501 (5th Cir.), cert. denied sub nom. Cooper v. United States, 113 S. Ct. 832 (1992) (White and Blackmun, JJ., dissenting from denial of cert.), and cert. denied sub nom. United States v. Sewell, 113 S. Ct. 1367 (1993) (White and Blackmun, JJ., opinion dissenting from denial of cert.).

Effective Date: The effective date of this amendment is November 1, 1993.

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

"16. Where (A) the amount of the controlled substance for which the defendant is accountable under §1B1.3 (Relevant Conduct) results in a base offense level greater than 36, (B) the court finds that this offense level overrepresents the defendant's culpability in the criminal activity, and (C) the defendant qualifies for a mitigating role adjustment under §3B1.2 (Mitigating Role), a downward departure may be warranted. The court may depart to a sentence no lower than the guideline range that would have resulted if the defendant's Chapter Two offense level had been offense level 36. Provided, that a defendant is not eligible for a downward departure under this provision if the defendant:

(a) has one or more prior felony convictions for a crime of violence or a controlled substance offense as defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1);

(b) qualifies for an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill);

(c) possessed or induced another participant to use or possess a firearm in the

offense;

(d) had decision-making authority;

(e) owned the controlled substance or financed any part of the offense; or

(f) sold the controlled substance or played a substantial part in negotiating the terms of the sale.

Example: A defendant, who the court finds meets the criteria for a downward departure under this provision, has a Chapter Two offense level of 40, a 2-level reduction for a minor role from §3B1.2, and a 3-level reduction for acceptance of responsibility from §3E1.1. His final offense level is 35. If the defendant's Chapter Two offense level had been 36, the 2-level reduction for a minor role and 3-level reduction for acceptance of responsibility would have resulted in a final offense level of 31. Therefore, under this provision, a downward departure not to exceed 4 levels (from level 35 to level 31) would be authorized.".

Reason for Amendment: Where a defendant's base offense level is greater than level 36 and the defendant had a minimal or minor role in the offense (and meets certain other qualifications), the quantity of the controlled substance for which the defendant is held accountable under §1B1.3 (Relevant Conduct) may overrepresent the defendant's culpability in the criminal activity. To address this issue, this amendment adds an application note to §2D1.1 that authorizes a downward departure in the specific circumstances described and sets forth the extent of a departure authorized on this basis.

Effective Date: The effective date of this amendment is November 1, 1993.

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

"17. If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.".

Reason for Amendment: This amendment adds an application note to §2D1.1 authorizing a downward departure if, in a reverse sting operation, the court finds that the government agent set a price for the controlled substance that was substantially below market value and thereby significantly inflated the quantity of controlled substance purchased by the defendant beyond the amount the defendant otherwise could have afforded.

Effective Date: The effective date of this amendment is November 1, 1993.

487. Amendment: Section 2D1.1(c) is amended in the notes following the Drug Quantity Table by

inserting the following additional paragraph as the third paragraph.

"'Cocaine base,' for the purposes of this guideline, means 'crack.' 'Crack' is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.".

Reason for Amendment: This amendment provides that, for purposes of the guidelines, "cocaine base" means "crack." The amendment addresses an inter-circuit conflict. Compare, e.g., United States v. Shaw, 936 F.2d 412 (9th Cir. 1991) (cocaine base means crack) with United States v. Jackson, 968 F.2d 158 (2d Cir) (cocaine base has a scientific, chemical definition that is more inclusive than crack), cert. denied, 113 S. Ct. 664 (1992). Under this amendment, forms of cocaine base other than crack (e.g., coca paste, an intermediate step in the processing of coca leaves into cocaine hydrochloride, scientifically is a base form of cocaine, but it is not crack) will be treated as cocaine.

Effective Date: The effective date of this amendment is November 1, 1993.

488. Amendment: Section 2D1.1(c) is amended in the notes following the Drug Quantity Table by inserting the following additional paragraph at the end:

"In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table.".

The Commentary to §2D1.1 captioned "Application Notes" is amended in note 11 by deleting the first entry in the "Typical Weight Per Unit Table" as follows:

"LSD (Lysergic acid diethylamide) 0.05 mg".

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

"18. LSD on a blotter paper carrier medium typically is marked so that the number of doses ('hits') per sheet readily can be determined. When this is not the case, it is to be presumed that each 1/4 inch by 1/4 inch section of the blotter paper is equal to one dose.

In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted.".

The Commentary to §2D1.1 captioned "Background" is amended by inserting the following paragraphs at the end:

"Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but

different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.

The dosage weight of LSD selected exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in Chapman v. United States, 111 S. Ct. 1919 (1991) (holding that the term 'mixture or substance' in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. (Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP.) Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence (see Chapman; §5G1.1(b)).".

Reason for Amendment: The Commission has found that the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself (e.g., LSD is typically placed on blotter paper which generally weighs from 5 to 10 milligrams per dose; the weight of the LSD itself per dose is generally from 0.02 to 0.08 milligram; the Drug Enforcement Administration describes a standard dose of LSD as containing 0.05 milligram of LSD). As a result, basing the offense level on the entire weight of the LSD and carrier medium produces unwarranted disparity among offenses involving the same quantity of actual LSD but different carrier weights, as well as sentences that are disproportionate to those for other, more dangerous controlled substances, such as PCP, heroin, and cocaine. Under the guidelines prior to the amendment, for example, 100 grams of heroin or 500 grams of cocaine (weights that correspond to several thousand doses, the number depending upon the purity) result in the same offense level as 125 doses of LSD on blotter paper (which has an average weight of 8 milligrams per dose) or 1 dose of LSD on a sugar cube (2000 milligrams per dose).
Consequently, in cases involving LSD contained in a carrier medium, this amendment establishes a weight per dose of 0.4 milligram to be used for purposes of determining the base offense level. The dosage weight of LSD selected by the Commission exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in Chapman v. United States, 111 S. Ct. 1919 (1991) (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the weight per dose selected is

less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP (for example, 2000 doses of LSD at 0.5 milligram per dose equals 1 gram of LSD -- corresponding to the lower limit of offense level 26; similarly, 2000 doses of PCP at 5 milligrams per dose, the standard amount of actual PCP in a dose, equals 10 grams of actual PCP -- corresponding to the lower limit of offense level 26). Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the definition of mixture or substance for purposes of applying any mandatory minimum sentence (see Chapman; §5G1.1(b)).

Effective Date: The effective date of this amendment is November 1, 1993.

489. Amendment: The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 2 by deleting:

> "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.",

and inserting in lieu thereof:

"In a few cases, the offense level for the underlying offense determined under the preceding paragraph may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) (i.e., the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).".

Reason for Amendment: This amendment simplifies the operation of §2K2.4 in order to reduce erroneous application by deleting the proviso in Application Note 2 and, in lieu thereof, authorizing an upward departure in the unusual case in which the combined sentence for an underlying offense and a firearms or explosives offense (under 18 U.S.C. § 844(h), §924(c), or § 929(a)) is less than the maximum of the guideline range that would have resulted if there had been no additional conviction for the firearms or explosives offense.

Effective Date: The effective date of this amendment is November 1, 1993.

490. Amendment: Sections 2S1.3 and 2S1.4 are deleted in their entirety as follows:

"§2S1.3. Failure to Report Monetary Transactions; Structuring Transactions to Evade Reporting Requirements

(a) Base Offense Level:

(1) 13, if the defendant:

(A) structured transactions to evade reporting requirements; or

(B) knowingly filed, or caused another to file, a report containing materially false statements; or

(2) 5, otherwise.

(b) Specific Offense Characteristics

(1) If the defendant knew or believed that the funds were criminally derived property, increase by 4 levels. If the resulting offense level is less than level 13, increase to level 13.

(2) If the base offense level is from (a)(1) above and the

value of the funds exceeded $100,000, increase the offense level as specified in §2S1.1(b)(2).

(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.

Commentary

Statutory Provisions: 26 U.S.C. § 7203 (if a willful violation of 26 U.S.C. § 6050I); 31 U.S.C. §§ 5313, 5314, 5322, 5324. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

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).

Background: The offenses covered by this guideline relate to records and reports of certain transactions involving currency and monetary instruments. The maximum prison sentence for these offenses is ten years if there is any pattern of unlawful activity, and five years otherwise.

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.

Except in rare cases, the dollar value of the transactions not reported is an important indicator of several factors that are pertinent to the sentence, including the size of the criminal enterprise, and the extent to which the defendant aided the enterprise.

§2S1.4. Failure to File Currency and Monetary Instrument Report

(a) Base Offense Level: 9

(b) Specific Offense Characteristics

(1) If the defendant knew or believed that the funds were criminally derived property, increase by 4 levels.

(2) If the defendant knew or believed that the funds were intended to be used to promote criminal activity, increase by 4 levels.

(3) If the value of the funds exceeded $100,000, increase the offense level as specified in §2S1.1(b)(2).

(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.

Commentary

Statutory Provision: 31 U.S.C. § 5316. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

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).".

A replacement guideline with accompanying commentary is inserted as "§2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports)".

Reason for Amendment: This amendment consolidates existing §§2S1.3 and 2S1.4 and modifies these guidelines to assure greater consistency of punishment for similar offenses and greater sensitivity to indicia of offense seriousness.

Effective Date: The effective date of this amendment is November 1, 1993.

491. Amendment: Chapter Two, Part T, Subpart 1 is amended in the title by inserting ", EMPLOYMENT TAXES, ESTATE TAXES, GIFT TAXES, AND EXCISE TAXES (OTHER THAN ALCOHOL, TOBACCO, AND CUSTOMS TAXES)" at the end thereof.

Section 2T1.1 is amended in the title by inserting "; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents" at the end thereof.

Section 2T1.1(a) is amended by deleting:

"Base Offense Level: Level from §2T4.1 (Tax Table) corresponding to the tax loss.

For purposes of this guideline, the 'tax loss' is the greater of: (A) the total amount of tax that the taxpayer evaded or attempted to evade; and (B) the 'tax loss' defined in §2T1.3.",

and inserting in lieu thereof:

"(a) Base Offense Level:

(1) Level from §2T4.1 (Tax Table) corresponding to the tax loss; or

(2) 6, if there is no tax loss.".

Section 2T1.1(b)(2) is amended by deleting "nature" and inserting in lieu thereof "existence".

Section 2T1.1 is amended by inserting the following additional subsection:

"(c) Special Instructions

For the purposes of this guideline --

(1) If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed).

Notes:

(A) If the offense involved filing a tax return in which gross income was underreported, the tax loss shall be treated as equal to 28% of the unreported gross income (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(B) If the offense involved improperly claiming a deduction or an exemption, the tax loss shall be treated as equal to 28% of the amount of the improperly claimed deduction or exemption (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(C) If the offense involved improperly claiming a deduction to provide a basis for tax evasion in the future, the tax loss shall be treated as equal to 28% of the amount of the improperly claimed deduction (34% if the

taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(2) If the offense involved failure to file a tax return, the tax loss is the amount of tax that the taxpayer owed and did not pay.

Note: If the offense involved failure to file a tax return, the tax loss shall be treated as equal to 20% of the gross income (25% if the taxpayer is a corporation) less any tax withheld or otherwise paid, unless a more accurate determination of the tax loss can be made.

(3) If the offense involved willful failure to pay tax, the tax loss is the amount of tax that the taxpayer owed and did not pay.

(4) If the offense involved improperly claiming a refund to which the claimant was not entitled, the tax loss is the amount of the claimed refund to which the claimant was not entitled.

(5) The tax loss is not reduced by any payment of the tax subsequent to the commission of the offense.".

The Commentary to §2T1.1 captioned "Statutory Provision" is amended by deleting "Provision: 26 U.S.C. § 7201" and inserting in lieu thereof "Provisions: 26 U.S.C. §§ 7201, 7203 (other than a violation based upon 26 U.S.C. § 6050I), 7206 (other than a violation based upon 26 U.S.C. § 6050I or § 7206(2)), and 7207".

The Commentary to §2T1.1 captioned "Application Notes" is amended by deleting Notes 1 and 4 as follows:

"1. False statements in furtherance of the evasion (see §§2T1.3, 2T1.5, and 2T1.8) are considered part of the offense for purposes of this guideline.",

"4. The guideline refers to §2T1.3 to provide an alternative minimum standard for the tax loss, which is based on a percentage of the dollar amounts of certain misstatements made in returns filed by the taxpayer. This alternative standard may be easier to determine, and should make irrelevant the issue of whether the taxpayer was entitled to offsetting adjustments that he failed to claim.";

and by renumbering the remaining notes accordingly.

The Commentary to §2T1.1 captioned "Application Notes" is amended in Note 1 (formerly Note 2) by deleting "For purposes of the guideline, the tax loss is the amount of tax that the taxpayer evaded or attempted to evade" and inserting in lieu thereof "'Tax loss' is defined in subsection (c)"; by deleting "deficiency" and inserting in lieu thereof "figures"; and by inserting the following additional paragraphs at the end:

"Notes under subsections (c)(1) and (c)(2) address certain situations in income tax cases in which the tax loss may not be reasonably ascertainable. In these situations, the 'presumptions' set forth are to be used unless the government or defense provides

sufficient information for a more accurate assessment of the tax loss. In cases involving other types of taxes, the presumptions in the notes under subsections (c)(1) and (c)(2) do not apply.

Example 1: A defendant files a tax return reporting income of $40,000 when his income was actually $90,000. Under Note (A) to subsection (c)(1), the tax loss is treated as $14,000 ($90,000 of actual gross income minus $40,000 of reported gross income = $50,000 x 28%) unless sufficient information is available to make a more accurate assessment of the tax loss.

Example 2: A defendant files a tax return reporting income of $60,000 when his income was actually $130,000. In addition, the defendant claims $10,000 in false tax credits. Under Note (A) to subsection (c)(1), the tax loss is treated as $29,600 ($130,000 of actual gross income minus $60,000 of reported gross income = $70,000 x 28% = $19,600, plus $10,000 of false tax credits) unless sufficient information is available to make a more accurate assessment of the tax loss.

Example 3: A defendant fails to file a tax return for a year in which his salary was $24,000, and $2,600 in income tax was withheld by his employer. Under the note to subsection (c)(2), the tax loss is treated as $2,200 ($24,000 of gross income x 20% = $4,800, minus $2,600 of tax withheld) unless sufficient information is available to make a more accurate assessment of the tax loss.

In determining the tax loss attributable to the offense, the court should use as many methods set forth in subsection (c) and this commentary as are necessary given the circumstances of the particular case. If none of the methods of determining the tax loss set forth fit the circumstances of the particular case, the court should use any method of determining the tax loss that appears appropriate to reasonably calculate the loss that would have resulted had the offense been successfully completed.".

The Commentary to §2T1.1 captioned "Application Notes" is amended in Note 3 (formerly Note 5) by deleting "or local" and inserting in lieu thereof "local, or foreign".

The Commentary to §2T1.1 captioned "Application Notes" is amended in Note 4 (formerly Note 6) by deleting "§2T1.1(b)(2)" and inserting in lieu thereof "subsection (b)(2)"; by inserting a comma immediately following "applied"; and by inserting "or fictitious entities" immediately following "shells".

The Commentary to §2T1.1 captioned "Application Notes" is amended by inserting the following additional notes:

"5. A ‘credit claimed against tax’ is an item that reduces the amount of tax directly. In contrast, a ‘deduction’ is an item that reduces the amount of taxable income.

6. ‘Gross income,’ for the purposes of this section, has the same meaning as it has in 26 U.S.C. § 61 and 26 C.F.R. § 1.61.

7. If the offense involves both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together.".

The Commentary to §2T1.1 captioned "Background" is amended by deleting:

" This guideline relies most heavily on the amount of tax evaded because the chief interest protected by the statute is the collection of taxes. A greater evasion is obviously more harmful to the treasury, and more serious than a smaller one with otherwise similar characteristics. Furthermore, as the potential benefit from tax evasion increases, the sanction necessary to deter also increases.

The overlapping imprisonment ranges in the Sentencing Table are intended to minimize the significance of disputes. The consequence of an inexact estimate of the tax loss is never severe, even when the tax loss is near the boundary of a range. For example, although the difference between $39,999 and $40,001 results in a change from level 10 to level 11, any sentence of eight to twelve months would be within the guidelines regardless of the offense level determination made by the court. Indeed, any sentence between ten and twelve months would be within the guidelines for a tax loss ranging from $20,000 to $150,000. As a consequence, for all dollar amounts, the Sentencing Table affords the court considerable latitude in evaluating other factors, even when the amount of the tax loss is uncertain.

Under pre-guidelines practice, roughly half of all tax evaders were sentenced to probation without imprisonment, while the other half received sentences that required them to serve an average prison term of twelve months. This guideline is intended to reduce disparity in sentencing for tax evasion and to somewhat increase average sentence length. As a result, the number of purely probationary sentences will be reduced. The Commission believes that any additional costs of imprisonment that may be incurred as a result of the increase in the average term of imprisonment for tax evasion are inconsequential in relation to the potential increase in revenue. According to estimates current at the time this guideline was originally developed (1987), income taxes are underpaid by approximately $90 billion annually.

Although under pre-guidelines practice some large-scale evaders served as much as five years in prison, the average sentence length for defendants sentenced to a term of imprisonment did not increase rapidly with the amount of tax evaded. Thus, the average time served by those sentenced to a term of imprisonment for evading less than $10,000 in taxes was about nine months, while the corresponding figure for those evading over $100,000 in taxes was about sixteen months. Guideline sentences should result in small increases in the average length of imprisonment for most tax cases that involve less than $100,000 in tax evaded. The increase is expected to be somewhat larger for cases involving more taxes.

Failure to report criminally derived income is included as a factor for deterrence purposes. Criminally derived income is generally difficult to establish, so that the tax loss in such cases will tend to be substantially understated. An enhancement for offenders who violate the tax laws as part of a pattern of criminal activity from which they derive a substantial portion of their income also serves to implement the mandate of 28 U.S.C. § 994(i)(2). Estimates from pre-guidelines practice were that, on average, the presence of this factor increased time served by the equivalent of 2 levels.

Although tax evasion always involves some planning, unusually sophisticated

efforts to conceal the evasion decrease the likelihood of detection and therefore warrant an additional sanction for deterrence purposes. Analyses of pre-guidelines data for other frauds and property crimes showed that careful planning or sophistication generally resulted in an average increase of at least 2 levels.",

and inserting in lieu thereof:

" This guideline relies most heavily on the amount of loss that was the object of the offense. Tax offenses, in and of themselves, are serious offenses; however, a greater tax loss is obviously more harmful to the treasury and more serious than a smaller one with otherwise similar characteristics. Furthermore, as the potential benefit from the offense increases, the sanction necessary to deter also increases.

Under pre-guidelines practice, roughly half of all tax evaders were sentenced to probation without imprisonment, while the other half received sentences that required them to serve an average prison term of twelve months. This guideline is intended to reduce disparity in sentencing for tax offenses and to somewhat increase average sentence length. As a result, the number of purely probationary sentences will be reduced. The Commission believes that any additional costs of imprisonment that may be incurred as a result of the increase in the average term of imprisonment for tax offenses are inconsequential in relation to the potential increase in revenue. According to estimates current at the time this guideline was originally developed (1987), income taxes are underpaid by approximately $90 billion annually. Guideline sentences should result in small increases in the average length of imprisonment for most tax cases that involve less than $100,000 in tax loss. The increase is expected to be somewhat larger for cases involving more taxes.

Failure to report criminally derived income is included as a factor for deterrence purposes. Criminally derived income is generally difficult to establish, so that the tax loss in such cases will tend to be substantially understated. An enhancement for offenders who violate the tax laws as part of a pattern of criminal activity from which they derive a substantial portion of their income also serves to implement the mandate of 28 U.S.C. § 994(i)(2).

Although tax offenses always involve some planning, unusually sophisticated efforts to conceal the offense decrease the likelihood of detection and therefore warrant an additional sanction for deterrence purposes.".

Sections 2T1.2 and 2T1.3 are deleted in their entirety as follows:

"§2T1.2. Willful Failure To File Return, Supply Information, or Pay Tax

(a) Base Offense Level:

(1) 1 level less than the level from §2T4.1 (Tax Table) corresponding to the tax loss; or

(2) 5, if there is no tax loss.

For purposes of this guideline, 'tax loss' means the total amount of tax that the taxpayer owed and did not pay, but, in the event of a failure to file in any year, not less than 10 percent of the amount by which the taxpayer's gross income for that year exceeded $20,000.

(b) Specific Offense Characteristics

(1) If the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

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

(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.

Commentary

Statutory Provision: 26 U.S.C. § 7203 (other than a willful violation of 26 U.S.C. § 6050I).

Application Notes:

1. 'Criminal activity' means any conduct constituting a criminal offense under federal, state, or local law.

2. '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. An enhancement would be applied, for example, where the defendant used offshore bank accounts or transactions through corporate shells.

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.

Background: Violations of 26 U.S.C. § 7203 are usually serious misdemeanors that are similar to tax evasion, except that there need be no affirmative act in support of the offense. They are rarely prosecuted unless the defendant also owed taxes that he failed to pay.

Because the conduct generally is tantamount to tax evasion, the guideline is

similar to §2T1.1. Because the offense is a misdemeanor, the offense level has been set at one below the level corresponding to evasion of the same amount of taxes.

An alternative measure of the tax loss, 10 percent of gross income in excess of $20,000, has been provided because of the 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.

The intended impact of this guideline is to increase the average time served for this offense, and to increase significantly the number of violators who receive a term of imprisonment. Under pre-guidelines practice, the average time served for this offense was approximately 2.5 months, including those who were not sentenced to prison. Considering only those who did serve a term of imprisonment, the average term was about six to seven months.

§2T1.3. Fraud and False Statements Under Penalty of Perjury

(a) Base Offense Level:

(1) Level from §2T4.1 (Tax Table) corresponding to the tax loss, if the offense was committed in order to facilitate evasion of a tax; or

(2) 6, otherwise.

For purposes of this guideline, the 'tax loss' is 28 percent of 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. If the taxpayer is a corporation, use 34 percent in lieu of 28 percent.

(b) Specific Offense Characteristics

(1) If the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

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

Commentary

Statutory Provision: 26 U.S.C. § 7206, except § 7206(2). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. 'Criminal activity' means any conduct constituting a criminal offense under

federal, state, or local law.

2. '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. An enhancement would be applied, for example, where the defendant used offshore bank accounts or transactions through corporate shells.

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.

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).

Background: This guideline covers conduct that usually is analogous to tax evasion, although the elements differ. Accordingly, the offense is treated much like tax evasion.

Existence of a tax loss is not an element of these offenses. Furthermore, in instances where the defendant is setting the groundwork for evasion of a tax that is expected to become due in the future, he may make false statements that underreport income that as of the time of conviction may not yet have resulted in a tax loss. In order to gauge the seriousness of these offenses, the guidelines establish a rule for determining a 'tax loss' based on the nature and magnitude of the false statements made. Use of this approach also avoids complex problems of proof and invasion of privacy when returns of persons other than the defendant and co-defendants are involved.".

Section 2T1.4(a)(1) is amended by deleting "resulting tax loss, if any" and inserting in lieu thereof "tax loss".

Section 2T1.4(a)(2) is amended by deleting "otherwise" and inserting in lieu thereof "if there is no tax loss".

Section 2T1.4(a) is amended by deleting "§2T1.3" and inserting in lieu thereof "§2T1.1".

Section 2T1.4(b)(1) is amended by inserting "(A)" immediately following "If"; and by inserting "; or (B) the defendant was in the business of preparing or assisting in the preparation of tax returns" immediately before ", increase".

Section 2T1.4(b)(2) is amended by deleting "nature" and inserting in lieu thereof "existence".

Section 2T1.4(b) is amended by deleting:

"(3) If the defendant was in the business of preparing or assisting in the preparation of tax returns, increase by 2 levels.".

The Commentary to §2T1.4 captioned "Statutory Provision" is amended by inserting "(other than a violation based upon 26 U.S.C. § 6050I)" immediately following "§ 7206(2)".

The Commentary to §2T1.4 captioned "Application Notes" is amended by deleting Notes 1, 3, and 4 as follows:

"1. Subsection (b)(1) applies to persons who derive a substantial portion of their income through the promotion of tax fraud or tax evasion, e.g., through promoting fraudulent tax shelters.",

"3. Subsection (b)(3) applies to persons who regularly act as tax preparers or advisers for profit. Do not employ §3B1.3 (Abuse of Position of Trust or Use of Special Skill) if this adjustment applies. Subsection (b)(1) may also apply to such persons.

4. In certain instances, such as promotion of a tax shelter scheme, the defendant may advise other persons to violate their tax obligations through filing returns that find no support in the tax laws. If this type of conduct can be shown to have resulted in the filing of false returns (regardless of whether the principals were aware of their falsity), the misstatements in all such returns will contribute to one aggregate 'tax loss.'";

by renumbering Note 2 as Note 3; and by inserting the following as Notes 1 and 2:

"1. For the general principles underlying the determination of tax loss, see §2T1.1(c) and Application Note 1 of the Commentary to §2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents). In certain instances, such as promotion of a tax shelter scheme, the defendant may advise other persons to violate their tax obligations through filing returns that find no support in the tax laws. If this type of conduct can be shown to have resulted in the filing of false returns (regardless of whether the principals were aware of their falsity), the misstatements in all such returns will contribute to one aggregate 'tax loss.'

2. Subsection (b)(1) has two prongs. The first prong applies to persons who derive a substantial portion of their income through the promotion of tax schemes, e.g., through promoting fraudulent tax shelters. The second prong applies to persons who regularly prepare or assist in the preparation of tax returns for profit. If an enhancement from this subsection applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).".

The Commentary to §2T1.4 captioned "Application Notes" is amended in Note 3 (formerly Note 2) by inserting "or fictitious entities" immediately following "corporate shells".

The Commentary to §2T1.4 captioned "Background" is amended by deleting "tax preparers and advisers" and inserting in lieu thereof "those in the business of preparing or assisting in the preparation of tax returns and those who make a business of promoting tax fraud"; and by deleting "§2T1.3" and inserting in lieu thereof "§2T1.1".

Section 2T1.5 is deleted in its entirety as follows:

"§2T1.5. Fraudulent Returns, Statements, or Other Documents

(a) Base Offense Level: 6

Commentary

Statutory Provision: 26 U.S.C. § 7207.

Background: The offense is a misdemeanor. It is to be distinguished from 26 U.S.C. § 7206(1) (§2T1.3), which is a felony involving a false statement under penalty of perjury. The offense level has been set at 6 in order to give the sentencing judge considerable latitude because the conduct could be similar to tax evasion.".

Section 2T1.9 is amended in the title by deleting "Impair, Impede" and inserting in lieu thereof "Impede, Impair, Obstruct,".

Section 2T1.9(a)(1) is amended by deleting "§2T1.3, as applicable" and inserting in lieu thereof "§2T1.4, as appropriate".

Section 2T1.9(b)(1) is amended by inserting "to impede, impair, obstruct, or defeat the ascertainment, computation, assessment, or collection of revenue" immediately following "violence".

Section 2T1.9(b)(2) is amended by deleting "impede or impair the Internal Revenue Service in the assessment and" and inserting in lieu thereof "impede, impair, obstruct, or defeat the ascertainment, computation, assessment, or"; and by inserting the following additional sentence at the end:

"Do not, however, apply this adjustment if an adjustment from §2T1.4(b)(1) is applied.".

The Commentary to §2T1.9 captioned "Application Notes" is amended in Note 2 by deleting "§2T1.3 (whichever is applicable to the underlying conduct)" and inserting in lieu thereof "§2T1.4 (whichever guideline most closely addresses the harm that would have resulted had the conspirators succeeded in impeding, impairing, obstructing, or defeating the Internal Revenue Service)".

The Commentary to §2T1.9 captioned "Application Notes" is amended by inserting the following additional note:

"4. Subsection (b)(2) provides an enhancement where the conduct was intended to encourage persons, other than the participants directly involved in the offense, to violate the tax laws (e.g., an offense involving a 'tax protest' group that

encourages persons to violate the tax laws, or an offense involving the marketing of fraudulent tax shelters or schemes).".

Section 2T4.1 is amended by deleting:

"Tax Loss (Apply the Greatest)		Offense Level
(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.",

and inserting in lieu thereof:

"Tax Loss (Apply the Greatest)		Offense Level
(A)	$1,700 or less	6
(B)	More than $1,700	7
(C)	More than $3,000	8
(D)	More than $5,000	9
(E)	More than $8,000	10
(F)	More than $13,500	11
(G)	More than $23,500	12
(H)	More than $40,000	13
(I)	More than $70,000	14
(J)	More than $120,000	15
(K)	More than $200,000	16
(L)	More than $325,000	17
(M)	More than $550,000	18
(N)	More than $950,000	19
(O)	More than $1,500,000	20
(P)	More than $2,500,000	21
(Q)	More than $5,000,000	22
(R)	More than $10,000,000	23

(S)	More than $20,000,000	24
(T)	More than $40,000,000	25
(U)	More than $80,000,000	26.".

Reason for Amendment: This amendment consolidates §§2T1.1, 2T1.2, 2T1.3, and 2T1.5, thereby eliminating the confusion that has arisen in some cases regarding which guideline applies. In addition, by adopting a uniform definition of tax loss, this amendment eliminates the anomaly of using actual tax loss in some cases and an amount that differs from actual tax loss in others. Furthermore, this amendment consolidates §2T1.4(b)(1) and (b)(3) to reflect the substantial overlap between these subsections. Finally, this amendment adopts a revised "tax loss" table to provide increased deterrence for tax offenses.

Effective Date: The effective date of this amendment is November 1, 1993.

492. Amendment: The Commentary to §3B1.3 captioned "Application Notes" is amended by deleting Note 1 as follows:

"1. The position of trust must have contributed in some substantial way to facilitating the crime and not merely have provided an opportunity that could as easily have been afforded to other persons. This adjustment, for example, would not apply to an embezzlement by an ordinary bank teller.",

and inserting in lieu thereof:

"1. 'Public or private trust' refers to a position of public or private trust characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. For this enhancement to apply, the position of trust must have contributed in some significant way to facilitating the commission or concealment of the offense (e.g., by making the detection of the offense or the defendant's responsibility for the offense more difficult). This adjustment, for example, would apply in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. This adjustment would not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized by the above-described factors.

Notwithstanding the preceding paragraph, because of the special nature of the United States mail an adjustment for an abuse of a position of trust will apply to any employee of the U.S. Postal Service who engages in the theft or destruction of undelivered United States mail.".

Reason for Amendment: This amendment reformulates the definition of an abuse of position of trust to better distinguish cases warranting this enhancement.

Effective Date: The effective date of this amendment is November 1, 1993.

493. Amendment: The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 1 by inserting the following additional sentence at the end of the first paragraph:

> "Conduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of §1B1.3 (Relevant Conduct).".

The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 6 in the first sentence of the first paragraph by inserting "(A)" immediately before "have been reversed"; by deleting the comma following "law"; and by inserting "or (B) have been ruled constitutionally invalid in a prior case" immediately before "are not to be counted";

The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 6 by deleting the second sentence as follows:

> "Also, sentences resulting from convictions that a defendant shows to have been previously ruled constitutionally invalid are not to be counted.",

and inserting in lieu thereof:

> "With respect to the current sentencing proceeding, this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law (e.g., 21 U.S.C. § 851 expressly provides that a defendant may collaterally attack certain prior convictions).";

and by beginning a new paragraph with the third sentence.

The Commentary to §4A1.2 captioned "Background" is amended by deleting the second paragraph as follows:

> "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 expressly provides that the term "part of the instant offense" in §4A1.2(a)(1) means relevant conduct as defined in §1B1.3 (Relevant Conduct) to avoid double counting and ensure consistency with other guideline provisions.

This amendment also clarifies the Commission's intent with respect to whether §4A1.2 confers on defendants a right to attack prior convictions collaterally at sentencing, an issue on which the appellate courts have differed. Compare, e.g., United States v. Canales, 960 F.2d 1311, 1316 (5th Cir. 1992) (Section 4A1.2 commentary indicates Commission intended to grant sentencing courts discretion to entertain initial defendant challenges to prior convictions); United States v. Jacobetz, 955 F.2d 786, 805 (2d Cir.) (similar), cert. denied, 113 S. Ct. 104 (1992); United States v. Cornog, 945 F.2d 1504, 1511 (11th Cir. 1991) (similar) with United States v. Hewitt, 942 F.2d 1270, 1276 (8th Cir. 1991) (commentary indicates defendants may only challenge use of prior convictions at sentencing by showing such conviction previously ruled invalid). This amendment addresses this inter-circuit conflict in interpreting the commentary by stating more clearly that the Commission does not intend to enlarge a defendant's right to attack collaterally a prior conviction at the current sentencing proceeding beyond any right otherwise recognized in law.

Effective Date: The effective date of this amendment is November 1, 1993.

494. The Commentary to §5G1.3 captioned "Application Notes" is amended in the second paragraph of Note 2 by deleting "40" and inserting in lieu thereof "30", and by deleting "55" and inserting in lieu thereof "45".

The Commentary to §5G1.3 captioned "Application Notes" is amended by inserting the following additional note:

"4. If the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense should be imposed to be served consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release (in accord with the policy expressed in §§7B1.3 and 7B1.4).".

Reason for Amendment: This amendment adds an application note to §5G1.3 to provide guidance in the case of a defendant who was on federal or state probation, parole, or supervised release at the time of the instant federal offense and has had such term of supervision revoked prior to sentencing on the instant federal offense. In addition, this amendment corrects a mathematical error in an example.

Effective Date: The effective date of this amendment is November 1, 1993.

495. Amendment: The Commentary to §6B1.2 is amended by inserting the following additional paragraph at the end:

" The Commission encourages the prosecuting attorney prior to the entry of a plea of guilty or nolo contendere under Rule 11 of the Federal Rules of Criminal Procedure to disclose to the defendant the facts and circumstances of the offense and offender characteristics, then known to the prosecuting attorney, that are relevant to the application of the sentencing guidelines. This recommendation, however, shall not be construed to confer upon the defendant any right not otherwise recognized in law.".

Reason for Amendment: This amendment adds commentary to §6B1.2 recommending that the prosecuting attorney disclose to the defendant the facts and circumstances of the offense and offender characteristics then known to the prosecuting attorney that are relevant to the application of the guidelines in order to encourage plea negotiations that realistically reflect probable outcomes.

Effective Date: The effective date of this amendment is November 1, 1993.

496. Amendment: Appendix A (Statutory Index) is amended in the second paragraph of the introduction by deleting "or an attempt" and inserting in lieu thereof ", attempt, or solicitation".

Appendix A (Statutory Index) is amended by inserting the following at the appropriate place by title and section:

"16 U.S.C. § 742j-1(a)	2Q2.1",
"16 U.S.C. § 773e(a)(2), (3),(4),(6)	2A2.4",
"16 U.S.C. § 773g	2A2.4",
"16 U.S.C. § 916c	2Q2.1",
"16 U.S.C. § 916f	2Q2.1",
"16 U.S.C. § 973c(a)(8), (10),(11),(12)	2A2.4",
"16 U.S.C. § 973e	2A2.4",
"16 U.S.C. § 1417(a)(5),(6), (b)(2)	2A2.4",
"16 U.S.C. § 3606	2A2.4",
"16 U.S.C. § 3637(a)(2), (3),(4),(6),(c)	2A2.4",
"16 U.S.C. § 4223	2Q2.1",
"16 U.S.C. § 4224	2Q2.1",
"16 U.S.C. § 4910(a)	2Q2.1",
"16 U.S.C. § 4912(a)(2)(A)	2Q2.1",
"16 U.S.C. § 5009(5),(6), (7),(8)	2A2.4",
"16 U.S.C. § 5010(b)	2A2.4",
"18 U.S.C. § 43	2B1.3",
"18 U.S.C. § 228	2J1.1",
"18 U.S.C. § 924(h)	2K2.1",
"18 U.S.C. § 2119	2B3.1",
"18 U.S.C. § 2322	2B6.1",
"22 U.S.C. § 2197(n)	2F1.1",
"26 U.S.C. § 7208	2F1.1",
"26 U.S.C. § 7212(a) (omnibus clause)	2J1.2, 2T1.1",
"26 U.S.C. § 7232	2F1.1",
"29 U.S.C. § 530	2B3.2",
"29 U.S.C. § 1131	2E5.3",
"30 U.S.C. § 1461(a)(3), (4),(5),(7)	2A2.4",
"30 U.S.C. § 1463	2A2.4",
"42 U.S.C. § 1973gg-10	2H2.1",
"42 U.S.C. § 9151(2),(3), (4),(5),	2A2.4",
"42 U.S.C. § 9152(d)	2A2.4",
"46 U.S.C. App. § 1707a (f)(2)	2B1.1",
"49 U.S.C. App. § 1687(g)	2B1.3".

Appendix A (Statutory Index) is amended by deleting:

"7 U.S.C. § 13(a)	2B1.1
7 U.S.C. § 13(b)	2F1.1
7 U.S.C. § 13(c)	2F1.1

7 U.S.C. § 13(e)	2F1.2",

and inserting in lieu thereof:

"7 U.S.C. § 13(a)(1)	2B1.1
7 U.S.C. § 13(a)(2)	2F1.1
7 U.S.C. § 13(a)(3)	2F1.1
7 U.S.C. § 13(a)(4)	2F1.1
7 U.S.C. § 13(c)	2C1.3
7 U.S.C. § 13(d)	2F1.2
7 U.S.C. § 13(f)	2F1.2";

in the lines referenced to 15 U.S.C. §§ 1172, 1173, 1174, 1175, and 1176 by deleting "2E3.3" and inserting in lieu thereof "2E3.1";

in the lines referenced to 16 U.S.C. §§ 1029 and 1030 by deleting "2A2.2, 2A2.3, 2Q2.1" and inserting in lieu thereof "2A2.4";

in the line referenced to 16 U.S.C. § 1857(1)(D) by deleting "2A2.3" and inserting in lieu thereof "2A2.4";

in the line referenced to 16 U.S.C. § 1857(1)(E) by deleting "2A2.2, 2A2.3" and inserting in lieu thereof "2A2.4";

in the line referenced to 16 U.S.C. § 1857(1)(F) by deleting "2A2.3" and inserting in lieu thereof "2A2.4";

in the line referenced to 16 U.S.C. § 1857(1)(H) by deleting "2A2.2, 2A2.3" and inserting in lieu thereof "2A2.4";

by deleting:

"16 U.S.C. § 1857(2)	2Q2.1";

in the line referenced to 16 U.S.C. § 1859 by deleting "2A2.2, 2A2.3, 2Q2.1" and inserting in lieu thereof "2A2.4";

in the line referenced to 16 U.S.C. § 2435(4) by deleting "2A2.3" and inserting in lieu thereof "2A2.4";

in the lines referenced to 16 U.S.C. §§ 2435(5), 2435(6), 2435(7), and 2438 by deleting "2A2.2, 2A2.3" and inserting in lieu thereof "2A2.4";

in the line referenced to 18 U.S.C. § 32(a),(b) by deleting "2A1.1-2A2.3" and inserting in lieu thereof "2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3".

in the lines referenced to 18 U.S.C. §§ 201(b)(3) and 201(b)(4) by deleting "2J1.8" and inserting in lieu thereof "2J1.3";

in the lines referenced to 18 U.S.C. §§ 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 488, 493, 494, 497, 498, 499, 500, 502, 503, 505, 506, 507, 508, 509, 510, and 513 by deleting "2B5.2" and inserting in lieu thereof "2F1.1";

in the lines referenced to 18 U.S.C. §§ 553(a)(1) and 553(a)(2) by deleting "2B1.2" and inserting in lieu thereof "2B1.1";

in the line referenced to 18 U.S.C. § 641 by deleting ", 2B1.2";

in the line referenced to 18 U.S.C. § 642 by deleting "2B5.2" and inserting in lieu thereof "2F1.1";

in the line referenced to 18 U.S.C. § 659 by deleting ", 2B1.2";

in the line referenced to 18 U.S.C. § 662 by deleting "2B1.2" and inserting in lieu thereof "2B1.1";

in the line referenced to 18 U.S.C. § 664 by deleting "2E5.2" and inserting in lieu thereof "2B1.1";

in the line referenced to 18 U.S.C. § 666(a)(1)(C) by deleting "18 U.S.C. § 666(a)(1)(C)"and inserting in lieu thereof "18 U.S.C. § 666(a)(2)";

in the line referenced to 18 U.S.C. § 667 by deleting ", 2B1.2";

in the line referenced to 18 U.S.C. § 798 by deleting ", 2M3.6";

in the line referenced to 18 U.S.C. § 842(j) by deleting "2K1.2" and inserting in lieu thereof "2K1.1";

in the line referenced to 18 U.S.C. § 844(h) by deleting "2K1.4 (offenses committed prior to November 18, 1988), 2K1.6, 2K1.7" and inserting in lieu thereof "2K2.4 (2K1.4 for offenses committed prior to November 18, 1988)";

in the lines referenced to 18 U.S.C. §§ 1003 and 1010 by deleting "2B5.2,";

in the line referenced to 18 U.S.C. § 1024 by deleting "2B1.2" and inserting in lieu thereof "2B1.1";

in the line referenced to 18 U.S.C. § 1028 by deleting ", 2L2.3, 2L2.4";

in the line referenced to 18 U.S.C. § 1082 by deleting "2E3.3" and inserting in lieu thereof "2E3.1";

in the line referenced to 18 U.S.C. § 1084 by deleting "2E3.2" and inserting in lieu thereof "2E3.1";

in the line referenced to 18 U.S.C. § 1153 by deleting "2B2.2,";

in the line referenced to 18 U.S.C. § 1163 by deleting ", 2B1.2";

in the lines referenced to 18 U.S.C. §§ 1301, 1302, 1303, 1304, 1306, and 1511 by deleting "2E3.3" and inserting in lieu thereof "2E3.1";

in the line referenced to 18 U.S.C. § 1541 by deleting "2L2.3" and inserting in lieu thereof "2L2.1";

in the lines referenced to 18 U.S.C. §§ 1542, 1543, and 1544 by deleting "2L2.3, 2L2.4" and inserting in lieu thereof "2L2.1, 2L2.2";

in the line referenced to 18 U.S.C. § 1704 by deleting "2B5.2,";

in the line referenced to 18 U.S.C. § 1708 by deleting "2B1.2,";

in the line referenced to 18 U.S.C. § 1716C by deleting "2B5.2" and inserting in lieu thereof "2F1.1";

in the lines referenced to 18 U.S.C. §§ 1852 and 1854 by deleting "2B1.2,";

in the line referenced to 18 U.S.C. § 1951 by deleting "2E1.5" and inserting in lieu thereof "2B3.1, 2B3.2, 2B3.3, 2C1.1";

in the line referenced to 18 U.S.C. § 1953 by deleting "2E3.3" and inserting in lieu thereof "2E3.1";

in the line referenced to 18 U.S.C. § 2113(a) by deleting "2B2.2" and inserting in lieu thereof "2B2.1";

in the line referenced to 18 U.S.C. § 2113(c) by deleting ", 2B1.2";

in the lines referenced to 18 U.S.C. §§ 2115, 2116, 2117, and 2118(b) by deleting "2B2.2" and inserting in lieu thereof "2B2.1";

in the line referenced to 18 U.S.C. § 2154 by deleting "2M2.2" and inserting in lieu thereof "2M2.1";

in the line referenced to 18 U.S.C. § 2156 by deleting "2M2.4" and inserting in lieu thereof "2M2.3";

in the line referenced to 18 U.S.C. § 2197 by deleting "2B5.2,";

in the line referenced to 18 U.S.C. § 2276 by deleting "2B2.2" and inserting in lieu thereof "2B2.1";

in the lines referenced to 18 U.S.C. §§ 2312 and 2313 by deleting ", 2B1.2";

in the lines referenced to 18 U.S.C. §§ 2314 and 2315 by deleting "2B1.2, 2B5.2,";

in the lines referenced to 18 U.S.C. §§ 2316 and 2317 by deleting ", 2B1.2";

in the lines referenced to 18 U.S.C. §§ 2318 and 2320 by deleting "2B5.4" and inserting in lieu thereof "2B5.3";

in the line referenced to 20 U.S.C. § 1097(a) by deleting "2B5.2,";

by deleting:

"21 U.S.C. § 842(a)(2)	2D3.3
21 U.S.C. § 842(a)(9),(10)	2D3.5",

and inserting in lieu thereof:

"21 U.S.C. § 842(a)(2),(9),(10)	2D3.2";

in the line referenced to 21 U.S.C. § 846 by deleting ", 2D3.3, 2D3.4, 2D3.5";

in the lines referenced to 21 U.S.C. §§ 954 and 961 by deleting "2D3.4" and inserting in lieu thereof "2D3.2";

in the line referenced to 21 U.S.C. § 963 by deleting ", 2D3.3, 2D3.4, 2D3.5";

in the line referenced to 22 U.S.C. § 4221 by deleting "2B5.2" and inserting in lieu thereof "2F1.1";

in the line referenced to 26 U.S.C. § 7203 by deleting "2T1.2" and inserting in lieu thereof "2T1.1";

in the line referenced to 26 U.S.C. § 7206(1),(3),(4),(5) by deleting "2T1.3" and inserting in lieu thereof "2S1.3, 2T1.1";

in the line referenced to 26 U.S.C. § 7206(2) by inserting "2S1.3," immediately before "2T1.4";

in the line referenced to 26 U.S.C. § 7207 by deleting "2T1.5" and inserting in lieu thereof "2T1.1";

in the line referenced to 26 U.S.C. § 7211 by deleting "2T1.3" and inserting in lieu thereof "2T1.1";

in the line referenced to 26 U.S.C. § 7212(a) by deleting "2A2.2, 2A2.3" and inserting in lieu thereof "2A2.4";

in the line referenced to 29 U.S.C. § 186 by deleting "2E5.6" and inserting in lieu thereof "2E5.1";

in the lines referenced to 29 U.S.C. §§ 431, 432, 433, 439, and 461 by deleting "2E5.5" and inserting in lieu thereof "2E5.3";

in the line referenced to 29 U.S.C. § 501(c) by deleting "2E5.4" and inserting in lieu thereof "2B1.1";

in the line referenced to 31 U.S.C. § 5316 by deleting "2S1.4" and inserting in lieu thereof "2S1.3";

in the line referenced to 31 U.S.C. § 5322 by deleting ", 2S1.4";

in the line referenced to 33 U.S.C. § 1232(b)(2) by deleting "2A2.2, 2A2.3" and inserting in lieu thereof "2A2.4";

in the line referenced to 33 U.S.C. § 1415(b) by inserting "§2Q1.2," immediately before "2Q1.3";

in the line referenced to 46 U.S.C. § 3718(b) by deleting "2K3.1" and inserting in lieu thereof "2Q1.2";

in the lines referenced to 49 U.S.C. §§ 1472(h)(2) and 1809(b) by deleting "2K3.1" and inserting in lieu thereof "2Q1.2";

in the line referenced to 50 U.S.C. § 783(b) by deleting "2M3.7" and inserting in lieu thereof "2M3.3"; and

in the line referenced to 50 U.S.C. § 783(c) by deleting "2M3.8" and inserting in lieu thereof "2M3.3".

The Commentary to §2J1.1 captioned "Statutory Provision" is amended by deleting "Provision: 18 U.S.C. § 401" and inserting lieu thereof "Provisions: 18 U.S.C. §§ 401, 228".

The Commentary to §2J1.1 captioned "Application Note" is amended in the caption by deleting "Note" and inserting lieu thereof "Notes"; and by inserting the following additional note:

> "2. For offenses involving the willful failure to pay court-ordered child support (violations of 18 U.S.C. § 228), the most analogous guideline is §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). The amount of the loss is the amount of child support that the defendant willfully failed to pay. Note: This guideline applies to second and subsequent offenses under 18 U.S.C. § 228. A first offense under 18 U.S.C. § 228 is not covered by this guideline because it is a Class B misdemeanor.".

The Commentary to §2X1.1 captioned "Application Notes" is amended in Note 1 by deleting:

> "Offense guidelines that expressly cover attempts include: §2A2.1 (Assault With Intent to Commit Murder; Attempted Murder); §2A3.1 (Criminal Sexual Abuse; Attempt 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); §2D1.1 (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); §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: §2A1.5 (Conspiracy or Solicitation to Commit Murder); §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); §2H1.1 (Conspiracy to Interfere with Civil Rights; Going in Disguise to Deprive of Rights); §2T1.9 (Conspiracy to Impair, Impede or Defeat Tax).

Offense guidelines that expressly cover solicitations include: §2A1.5 (Conspiracy or Solicitation to Commit 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).",

and inserting in lieu thereof:

"Offense guidelines that expressly cover attempts include:

§§2A2.1, 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2A4.2, 2A5.1;
§§2C1.1, 2C1.2;
§§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;
§2E5.1;
§2N1.1;
§2Q1.4.

Offense guidelines that expressly cover conspiracies include:

§2A1.5;
§§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;
§2H1.1;
§2T1.9.

Offense guidelines that expressly cover solicitations include:

§2A1.5;
§§2C1.1, 2C1.2;
§2E5.1.".

The Commentary to §2X3.1 captioned "Application Notes" is amended in Note 1 in the second sentence by deleting "Note 1" and inserting in lieu thereof "Note 10".

The Commentary to §2X4.1 captioned "Application Notes" is amended in Note 1 in the second sentence by deleting "Note 1" and inserting in lieu thereof "Note 10".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 6 by inserting "; Bribery of Witness" immediately following "of Perjury"; by deleting "§2J1.8 (Bribery of Witness, or §2J1.9 (Payment to Witness)" and inserting in lieu thereof "§2J1.9 (Payment to Witness), §2X3.1 (Accessory After the Fact), or §2X4.1 (Misprision of Felony)"; and by deleting "or prosecution" and inserting in lieu thereof ", prosecution, or sentencing".

Section 3D1.2(d) is amended in the second paragraph by deleting "2B1.2,", "2B5.2,", "2B5.4,", "2E5.2, 2E5.4, 2E5.6", ", 2L2.3", and "2T1.2, 2T1.3,"; and in the third paragraph by deleting "2B2.2,", "2E1.5,", "2L2.4,", and "2M3.6, 2M3.7, 2M3.8,".

Section 8C2.1(a) is amended by deleting "2B1.2,", "2B5.4,", ", 2D3.4", "2E3.2, 2E3.3,", "2E5.2,", ", 2E5.4, 2E5.5, 2E5.6", "2K1.2,", ", 2S1.4", "2T1.2, 2T1.3," and "2T1.5,".

The Commentary to §8C2.4 captioned "Application Notes" is amended in Note 5 by inserting "; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations" immediately following "Plan"; and by deleting "§2S1.3 (Failure to Report Monetary Transactions; Structuring Transactions to Evade Reporting Requirements); and §2S1.4 (Failure to File Currency and Monetary Instrument Report)" and inserting in lieu thereof "and §2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports)".

Reason for Amendment: This amendment makes Appendix A more comprehensive, conforms it to the consolidation of offense guidelines under amendments 481, 490, and 491, and deletes references to several Class B and C misdemeanor offenses to which the guidelines do not apply. In addition, this amendment conforms §3D1.2(d), §8C2.1, and the Commentary to §§2X1.1, 3C1.1, and 8C2.4 to the consolidation of offense guidelines under amendments 481, 490, and 491. In addition, this amendment reformats the Commentary to 2X1.1 for ease in application; corrects an omission in the second paragraph of the Introduction to Appendix A; revises Application Note 6 of the Commentary to §3C1.1 to make the listing of offense guidelines more comprehensive and correct the omission of a reference to the sentencing of the instant offense; and revises a reference in the Commentary to §§2X3.1 and 2X4.1 to conform to a previous revision in the referenced provision.

Effective Date: The effective date of this amendment is November 1, 1993.

497. Amendment: The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 4 by inserting the following additional paragraph as the second paragraph:

> "Absent an instruction to the contrary, the adjustments from different guideline sections are applied cumulatively (added together). For example, the adjustments from §2F1.1(b)(2) (more than minimal planning) and §3B1.1 (aggravating role) are applied cumulatively.".

Reason for Amendment: This amendment clarifies the Commission's intent that, absent an instruction to the contrary, adjustments from different guideline sections are to be applied

cumulatively.

Effective Date: The effective date of this amendment is November 1, 1993.

498. Amendment: The Commentary to §1B1.7 is amended by deleting the second paragraph as follows:

" In stating that failure to follow certain commentary 'could constitute an incorrect application of the guidelines,' the Commission simply means that in seeking to understand the meaning of the guidelines courts likely will look to the commentary for guidance as an indication of the intent of those who wrote them. In such instances, the courts will treat the commentary much like legislative history or other legal material that helps determine the intent of a drafter.",

and inserting in lieu thereof:

" '[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.' Stinson v. United States, 113 S. Ct. 1913, 1915 (1993).".

Reason for Amendment: This amendment revises the commentary to this section to reflect the decision of the Supreme Court in Stinson v. United States, 113 S. Ct. 1913, 1915 (1993).

Effective Date: The effective date of this amendment is November 1, 1993.

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

"Phenylcyclohexamine (PCE) = 5.79 kg of marihuana"

and inserting in lieu thereof:

"N-ethyl-1-phenylcyclohexylamine (PCE)= 1 kg of marihuana".

Reason for Amendment: This amendment revises the equivalency for PCE to reflect a reassessment of the potency of this controlled substance by the Drug Enforcement Administration. In addition, this amendment corrects an error in the scientific name for this controlled substance.

Effective Date: The effective date of this amendment is November 1, 1993.

500. Amendment: The Commentary to §3B1.1 captioned "Application Notes" is amended by renumbering Notes 2 and 3 as 3 and 4, respectively; and by inserting the following additional note:

"2. To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An

upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.".

Reason for Amendment: This amendment clarifies the operation of this section to resolve a split among the courts of appeal. Compare United States v. Carroll, 893 F.2d 1502 (6th Cir. 1990) (requiring degree of control over other persons for §3B1.1 to apply); United States v. Fuller, 897 F.2d 1217 (1st Cir. 1990) (same); United States v. Mares-Molina, 913 F.2d 770 (9th Cir. 1990) (same) and United States v. Fuentes, 954 F.2d 151 (3d Cir.) (same), cert. denied, 112 S.Ct. 2950 (1992) with United States v. Chambers, 985 F.2d 1263 (4th Cir.) (defendant may be a "manager" even though he did not directly supervise other persons), petition for cert. filed, No. 92-8737 (U.S. May 17, 1993).

Effective Date: The effective date of this amendment is November 1, 1993.

501. Amendment: The Commentary to §5E1.1 captioned "Background" is amended in the second paragraph by inserting the following additional sentence as the first sentence:

"A court's authority to decline to order restitution is limited.";

by inserting, immediately after "18 U.S.C. § 3663(d).", the following:

"The legislative history of 18 U.S.C. § 3579, the precursor of 18 U.S.C. § 3663, states that even '[i]n those unusual cases where the precise amount owed is difficult to determine, the section authorizes the court to reach an expeditious, reasonable determination of appropriate restitution by resolving uncertainties with a view toward achieving fairness to the victim.' S. Rep. No. 532, 97th Cong., 2d Sess. 31, reprinted in 1982 U.S. Code Cong. & Ad. News 2515, 2537.";

and by inserting the following additional sentence as the last sentence:

"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).".

The Commentary to §5E1.1 captioned "Background" is amended by deleting the fifth paragraph as follows:

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

and by deleting the seventh paragraph as follows:

" 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 updates the background commentary of §5E1.1 to reflect the redesignation of 18 U.S.C. § 3579 as 18 U.S.C. § 3663. In addition, it moves material from the fifth and seventh paragraphs to the second paragraph to enhance clarity.

Effective Date: The effective date of this amendment is November 1, 1993.

502. Amendment: Section 1B1.10(d) is amended by deleting "and 461" and inserting in lieu thereof "454, 461, 484, 488, 490, and 499".

Reason for Amendment: This amendment expands the listing in §1B1.10(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, 1993.

503. Amendment: The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 2 by inserting the following additional paragraph as the eighth paragraph:

"A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (e.g., in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant's offense level). The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted.".

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 9(B) by deleting "and the time interval between the offenses" and inserting in lieu thereof:

", the regularity (repetitions) of the offenses, and the time interval between the offenses. When one of the above factors is absent, a stronger presence of at least one of the other factors is required. For example, where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity".

Reason for Amendment: This amendment clarifies the operation of §1B1.3 with respect to the defendant's accountability for the actions of other conspirators prior to the defendant joining the conspiracy. The amendment is in accord with the rule stated in recent caselaw. See, e.g., United States v. Carreon, 11 F.3d 1225 (5th Cir. 1994); United States v. Petty, 982 F.2d 1374, 1377 (9th Cir. 1993); United States v. O'Campo, 973 F.2d 1015, 1026 (1st Cir. 1992). Cf. United States v. Miranda-Ortiz, 926 F.2d 172, 178 (2d Cir. 1991); United States v. Edwards, 945 F.2d 1387, 1393 (7th Cir. 1991)) (applying earlier versions of §1B1.3). In addition, this amendment adds a well-phrased formulation, developed by the Ninth Circuit in United States

v. Hahn, 960 F.2d 903 (9th Cir. 1992), addressing the circumstances in which multiple acts constitute the "same course of conduct."

Effective Date: The effective date of this amendment is November 1, 1994.

504. Amendment: Section 1B1.10(a) is amended by deleting "guidelines" and inserting in lieu thereof "Guidelines Manual"; by deleting "may be considered" and inserting in lieu thereof "is authorized"; by inserting "and thus is not authorized" immediately following "policy statement"; and by deleting "subsection (d)" wherever it appears and inserting in lieu thereof in each instance "subsection (c)".

Section 1B1.10(b) is amended by inserting ", and to what extent," immediately before "a reduction"; and by deleting:

> "originally imposed had the guidelines, as amended, been in effect at that time",

and inserting in lieu thereof:

> "imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced".

Section 1B1.10 is amended by deleting:

> "(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.";

and by redesignating subsection (d) as subsection (c).

Section 1B1.10(c)(formerly subsection (d)) is amended by inserting "371," immediately before "379"; and by deleting "and 499" and inserting in lieu thereof "499, and 506".

The Commentary to §1B1.10 captioned "Application Note" is amended by deleting "Note" and inserting in lieu thereof "Notes"; and by deleting:

> "1. Although eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) of this section, the amended guideline range referred to in subsections (b) and (c) of this section is to be determined by applying all amendments to the guidelines (i.e., as if the defendant was being sentenced under the guidelines currently in effect).",

and inserting in lieu thereof:

> "1. Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range.
>
> 2. In determining the amended guideline range under subsection (b), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All

other guideline application decisions remain unaffected.".

The Commentary to §1B1.10 captioned "Background" is amended in the third paragraph by deleting "subsection (d)" and inserting in lieu thereof "subsection (c)".

Reason for Amendment: This amendment simplifies the operation of §1B1.10 by providing that, in determining an amended guideline range, the court will use only those amendments expressly designated as retroactive. In addition, this amendment deletes §1B1.10(c), a rather complex subsection, as an unnecessary restriction on the court's consideration of a revised sentence, redesignates §1B1.10(d) as §1B1.10(c), and makes a number of minor clarifying revisions. This amendment also expands the listing in §1B1.10(c) (formerly §1B1.10(d)) to implement the directive in 28 U.S.C. § 994(u) with respect to guideline amendments that may be considered for retroactive application.

Effective Date: The effective date of this amendment is November 1, 1994.

505. Amendment: Section 2D1.1(c) is amended by deleting:

"(1) 300 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); 1500 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); 15 KG or more of Cocaine Base; 300 KG or more of PCP, or 30 KG or more of PCP (actual); 300 KG or more of Methamphetamine, or 30 KG or more of Methamphetamine (actual), or 30 KG or more of "Ice"; 3 KG or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); 120 KG or more of Fentanyl; 30 KG or more of a Fentanyl Analogue; 300,000 KG or more of Marihuana; 60,000 KG or more of Hashish; 6,000 KG or more of Hashish Oil.	Level 42
(2) At least 100 KG but less than 300 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least 500 KG but less than 1500 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least 5 KG but less than 15 KG of Cocaine Base; At least 100 KG but less than 300 KG of PCP, or at least 10 KG but less than 30 KG of PCP (actual); At least 100 KG but less than 300 KG of Methamphetamine, or at least 10 KG but less than 30 KG of Methamphetamine (actual), or at least 10 KG but less than 30 KG of "Ice"; 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;	Level 40

At least 20,000 KG but less than 60,000 KG of Hashish;
At least 2,000 KG but less than 6,000 KG of Hashish Oil.

(3) At least 30 KG but less than 100 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);
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 PCP (actual);
At least 30 KG but less than 100 KG of Methamphetamine, or at least 3 KG but less than 10 KG of Methamphetamine (actual), or at least 3 KG but less than 10 KG of "Ice";
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.", Level 38

and inserting in lieu thereof:

"(1) 30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates);
150 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
1.5 KG or more of Cocaine Base;
30 KG or more of PCP, or 3 KG or more of PCP (actual);
30 KG or more of Methamphetamine, or 3 KG or more of Methamphetamine (actual), or 3 KG or more of 'Ice';
300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
12 KG or more of Fentanyl;
3 KG or more of a Fentanyl Analogue;
30,000 KG or more of Marihuana;
6,000 KG or more of Hashish;
600 KG or more of Hashish Oil."; Level 38

and by renumbering subdivisions 4-19 as 2-17, respectively.

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 14 by deleting "860(b)(4)" and inserting in lieu thereof "960(b)(4)".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 16 by deleting "40" and inserting in lieu thereof "38"; by deleting "35" wherever it appears and inserting in

lieu thereof in each instance "33"; and by deleting "4 levels" and inserting in lieu thereof "2 levels".

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

"19. In an extraordinary case, an upward departure above offense level 38 on the basis of drug quantity may be warranted. For example, an upward departure may be warranted where the quantity is at least ten times the minimum quantity required for level 38.".

The Commentary to §2D1.6 captioned "Application Note" is amended in Note 1 by deleting "(§2D1.1(c)(16))" and inserting in lieu thereof "(§2D1.1(c)(14))"; and by deleting "(§2D1.1(c)(19))" and inserting in lieu thereof "(§2D1.1(c)(17))".

Reason for Amendment: This amendment sets the upper limit of the Drug Quantity Table in §2D1.1 at level 38. The Commission has determined that the extension of the Drug Quantity Table above level 38 for quantity itself is not required to ensure adequate punishment given that organizers, leaders, managers, and supervisors of such offenses will receive a 4-, 3-, or 2-level enhancement for their role in the offense, and any participant will receive an additional 2-level enhancement if a dangerous weapon is possessed in the offense. The Commission, however, has not foreclosed the possibility of an upward departure above offense level 38 on the basis of drug quantity in an extraordinary case. In addition, this amendment corrects a typographical error in a statutory reference.

Effective Date: The effective date of this amendment is November 1, 1994.

506. Amendment: The Commentary to §4B1.1 captioned "Application Notes" is amended in Note 2 by deleting:

"'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.",

and inserting in lieu thereof:

"'Offense Statutory Maximum,' for the purposes of this guideline, refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record (such sentencing enhancement provisions are contained, for example, in 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), (b)(1)(C), and (b)(1)(D)). For example, where the statutory maximum term of imprisonment under 21 U.S.C. § 841(b)(1)(C) is increased from twenty years to thirty years because the defendant has one or more qualifying prior drug convictions, the 'Offense Statutory Maximum' for the purposes of this guideline is twenty years and not thirty years.".

Reason for Amendment: This amendment defines the term "offense statutory maximum" in §4B1.1 to mean the statutory maximum prior to any enhancement based on prior criminal record (i.e., an enhancement of the statutory maximum sentence that itself was based upon the

defendant's prior criminal record will not be used in determining the alternative offense level under this guideline). This rule avoids unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions. It is noted that when the instruction to the Commission that underlies §4B1.1 (28 U.S.C. § 994(h)) was enacted by the Congress in 1984, the enhanced maximum sentences provided for recidivist drug offenders (e.g., under 21 U.S.C. § 841) did not exist.

Effective Date: The effective date of this amendment is November 1, 1994.

507. Amendment: The Commentary to §5G1.2 is amended in the fourth paragraph by deleting "3D1.2" and inserting in lieu thereof "3D1.1"; and by inserting the following additional sentences at the end:

> "Note, however, that even in the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. See 18 U.S.C. § 3624(e).".

Reason for Amendment: This amendment revises the Commentary to §5G1.2 to clarify that the Commission's interpretation is that 18 U.S.C. § 3624(e) requires multiple terms of supervised release to run concurrently in all cases. This interpretation is in accord with the view stated in United States v. Gullickson, 982 F.2d 1231, 1236 (8th Cir. 1993). In contrast, two courts of appeals have cited the current commentary as supporting the view that, notwithstanding the language in 18 U.S.C. § 3624(e) stating that terms of supervised release run concurrently, a court may order that supervised release terms run consecutively under certain circumstances. See United States v. Shorthouse, 7 F.3d 149 (9th Cir. 1993); United States v. Maxwell, 966 F.2d 545, 551 (10th Cir. 1992).

Effective Date: The effective date of this amendment is November 1, 1994.

508. Amendment: The Introductory Commentary to Chapter Five, Part H, is amended in the second paragraph by inserting the following additional sentences at the end:

> "Furthermore, although these factors are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range, they may be relevant to this determination in exceptional cases. See §5K2.0 (Grounds for Departure).".

Section 5K2.0 is amended by inserting the following additional paragraph as the fourth paragraph:

> "An offender characteristic or other circumstance that is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the 'heartland' cases covered by the guidelines in a way that is important to the statutory purposes of sentencing.".

Section 5K2.0 is amended by inserting the following commentary at the end:

"Commentary

The last paragraph of this policy statement sets forth the conditions under which an offender characteristic or other circumstance that is not ordinarily relevant to a departure from the applicable guideline range may be relevant to this determination. The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the 'heartland' cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case. However, the Commission believes that such cases will be extremely rare.

In the absence of a characteristic or circumstance that distinguishes a case as sufficiently atypical to warrant a sentence different from that called for under the guidelines, a sentence outside the guideline range is not authorized. See 18 U.S.C. § 3553(b). For example, dissatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the guidelines is not an appropriate basis for a sentence outside the applicable guideline range.".

Reason for Amendment: This amendment revises §5K2.0 and the Introductory Commentary to Chapter Five, Part H to provide guidance as to when an offender characteristic or other circumstance (or combination of such characteristics or circumstances) that is not ordinarily relevant to a determination of whether a sentence should be outside the applicable guideline range may be relevant to this determination.

Effective Date: The effective date of this amendment is November 1, 1994.

509. Amendment: The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 7 by inserting the following additional sentences at the end:

"In addition, 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. See §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).".

The Commentary to §2D2.1 captioned "Background" is amended in the first paragraph by inserting "(statutory)" immediately following "Mandatory"; and by deleting "§5G1.1(b)" and inserting in lieu thereof:

"See §5G1.1(b). Note, however, that 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. See §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).".

Chapter Five, Part C, is amended by inserting an additional guideline with accompanying commentary as §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

Reason for Amendment: This amendment adds a new guideline as §5C1.2, and revises the commentary in §§2D1.1 and 2D1.2, to reflect the addition of 18 U.S.C. § 3553(f) by section 80001 of the Violent Crime Control and Law Enforcement Act of 1994.

Effective Date: The effective date of this amendment is September 23, 1994.

510. Amendment: Section 2A2.3 is amended by inserting the following additional subsection:

"(b) Specific Offense Characteristic

(1) If the offense resulted in substantial bodily injury to an individual under the age of sixteen years, increase by 4 levels.".

The Commentary to §2A2.3 captioned "Application Notes" is amended by inserting the following additional note:

"3. 'Substantial bodily injury' means 'bodily injury which involves - (A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty.' 18 U.S.C. § 113(b)(1).".

Reason for Amendment: This amendment addresses the enactment of 18 U.S.C. § 113(a)(7) (pertaining to certain assaults against minors) by section 170201 of the Violent Crime Control and Law Enforcement Act of 1994.

Effective Date: The effective date of this amendment is November 1, 1995.

511. Amendment: The Commentary to §2A3.1 captioned "Application Notes" is amended by inserting the following additional notes:

"6. If a victim was sexually abused by more than one participant, an upward departure may be warranted. See §5K2.8 (Extreme Conduct).

7. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.".

The Commentary to §2A3.2 captioned "Application Notes" is amended by inserting the following additional note:

"4. If the defendant's criminal history includes a prior sentence for conduct that is

similar to the instant offense, an upward departure may be warranted.".

The Commentary to §2A3.3 captioned "Application Note" is amended by deleting "Note" and inserting in lieu thereof "Notes"; and by inserting the following additional note:

"2. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.".

The Commentary to §2A3.4 captioned "Application Notes" is amended by inserting the following additional note:

"5. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.".

Reason for Amendment: Section 40111 of the Violent Crime Control and Law Enforcement Act of 1994 doubles the authorized maximum term of imprisonment for defendants convicted of sexual abuse offenses who have been convicted previously of aggravated sexual abuse, sexual abuse, or aggravated sexual contact (18 U.S.C. § 2247) and directs the Sentencing Commission to implement this provision by promulgating amendments, if appropriate, to the applicable sentencing guidelines. Although the Chapter Two sexual abuse guidelines do not provide for enhancement for repeat sex offenses, Chapter Four (Criminal History and Criminal Livelihood) does include a determination of the seriousness of the defendant's criminal record based upon prior convictions (§4A1.1). Section 4B1.1 (Career Offender) also provides substantially enhanced penalties for offenders who engage in a crime of violence (including forcible sexual offenses) or controlled substance trafficking offense, having been sentenced previously on two or more occasions for offenses of either type. Moreover, §4A1.3 (Adequacy of Criminal History category) provides that an upward departure may be considered "[i]f reliable information indicates that the criminal history category does not reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." This amendment strengthens the sexual offense guidelines by expressly listing as a basis for upward departure the fact that the defendant has a prior sentence for conduct similar to the instant sexual offense.

Section 40112 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to conduct a study and consider the adequacy of the guidelines for sexual offenses with respect to a number of factors. The provision also requires the preparation of a report to Congress analyzing federal rape sentences and obtaining comment from independent experts. See Report to Congress: Analysis of Penalties for Federal Rape Cases (March 13, 1995). The Commission found that, in general, the current guidelines provide appropriate penalties for these offenses. This amendment strengthens §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) in one respect by expressly listing as a basis for an upward departure the fact that a victim was sexually abused by more than one participant.

Effective Date: The effective date of this amendment is November 1, 1995.

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

"(2) If (A) a firearm, destructive device, or controlled substance was taken, or the

taking of such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, or controlled substance, increase by **1** level; but if the resulting offense level is less than **7**, increase to level **7**.";

and by renumbering the remaining subdivisions accordingly.

Section 2B1.1 is amended by inserting the following additional subsection:

"(c) Cross Reference

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of such item was an object of the offense, or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate, if the resulting offense level is greater than that determined above.".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 8 by deleting "(b)(6)" and inserting in lieu thereof "(b)(5)".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 11 by deleting "(b)(7)(B)" and inserting in lieu thereof "(b)(6)(B)".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 13 by deleting "(b)(7)(A)" and inserting in lieu thereof "(b)(6)(A)".

The Commentary to §2B1.1 captioned "Background" is amended by deleting the fourth paragraph as follows:

" Studies show that stolen firearms are used disproportionately in the commission of crimes. The guidelines provide an enhancement for theft of a firearm to ensure that some amount of imprisonment is required. An enhancement is also provided when controlled substances are taken. Such thefts may involve a greater risk of violence, as well as a likelihood that the substance will be abused.".

The Commentary to §2B1.1 captioned "Background" is amended in the sixth (formerly the seventh) paragraph by deleting "(b)(7)(A)" and inserting in lieu thereof "(b)(6)(A)"; and in the seventh (formerly the eighth) paragraph by deleting "(b)(7)(B)" and inserting in lieu thereof "(b)(6)(B)".

Reason for Amendment: This amendment addresses an inconsistency in guideline penalties between theft offenses involving the taking of firearms or controlled substances that are sentenced under §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property) and similar offenses sentenced under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) by deleting the specific offense characteristic in §2B1.1 applicable in such instances and inserting in lieu thereof a cross reference directing the application of §2D1.1,

§2D2.1, §2K1.3, or §2K2.1, as appropriate, if the resulting offense level is greater.

Effective Date: The effective date of this amendment is November 1, 1995.

513. Amendment: Section 2B5.1(b) is amended by inserting the following additional subdivision:

"(3) If a dangerous weapon (including a firearm) was possessed in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.".

The Commentary to §2B5.1 captioned "Application Notes" is amended in Note 2 by deleting "2B5.2" and inserting in lieu thereof "2F1.1".

The Commentary to §2B5.1 captioned "Background" is amended by inserting the following additional paragraph as the second paragraph:

" Subsection (b)(3) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103-322.".

Section 2F1.1(b)(4) is amended by inserting "(A)" immediately following "involved"; and by inserting "or (B) possession of a dangerous weapon (including a firearm) in connection with the offense," immediately following "injury,".

The Commentary to §2F1.1 captioned "Statutory Provisions" is amended by deleting "78d," immediately following "77x,".

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 12 by inserting "Hate Crime Motivation or" immediately before "Vulnerable Victim".

The Commentary to §2F1.1 captioned "Background" is amended by inserting the following additional paragraph as the sixth paragraph:

" Subsection (b)(4)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103-322.".

Reason for Amendment: Section 110512 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to amend its sentencing guidelines to provide an appropriate enhancement for a defendant convicted of a felony under Chapter 25 (Counterfeiting and Forgery) of title 18, United States Code, if the defendant used or carried a firearm during and in relation to the offense. This amendment implements this directive in a somewhat broader form.

In addition, this amendment corrects an outdated reference in the Commentary to §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) and conforms the Commentary to §2F1.1 (Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) with respect to the amended title of §3A1.1 (Hate Crime Motivation or Vulnerable Victim).

Effective Date: The effective date of this amendment is November 1, 1995.

514. Amendment: Section 2D1.1(b) is amended by inserting the following additional subdivision:

"(3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by 2 levels.".

Section 2D2.1(b) is amended by deleting "Reference" and inserting in lieu thereof "References"; and by inserting the following new subdivision:

"(2) If the offense involved possession of a controlled substance in a prison, correctional facility, or detention facility, apply §2P1.2 (Providing or Possessing Contraband in Prison).".

Reason for Amendment: Section 90103 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to amend the guidelines to provide an adequate enhancement for an offense under 21 U.S.C. § 841 that involves distributing a controlled substance in a federal prison or detention facility. This amendment addresses this directive by adding a two-level enhancement to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) for an offense involving a prison or detention facility, similar to the enhancement provided for drug distribution in other protected locations at §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy).

Section 90103 also directs the Commission to amend the guidelines to provide an appropriate enhancement for an offense of simple possession of a controlled substance under 21 U.S.C. § 844 that occurs in a federal prison or detention facility. This amendment addresses this directive by providing a cross reference in §2D2.1 (Unlawful Possession; Attempt or Conspiracy) that references §2P1.2 (Providing or Possessing Contraband in Prison) in such cases.

Effective Date: The effective date of this amendment is November 1, 1995.

515. Amendment: Section 2D1.1(b) is amended by inserting the following additional subdivision:

"(4) If the defendant meets the criteria set forth in subdivisions (1)-(5) of §5C1.2

(Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and the offense level determined above is level 26 or greater, decrease by 2 levels.".

Section 5C1.2, effective September 23, 1994, is repromulgated with the editorial changes set forth below.

The Commentary to §5C1.2 captioned "Application Notes" is amended in Note 6 by deleting "leader, organizer" and inserting in lieu thereof "organizer, leader".

The Commentary to §5C1.2 captioned "Application Notes" is amended in Note 8 by deleting "Rule 32(a)(1), Fed. R. Crim. P." and inserting in lieu thereof "Fed. R. Crim. P. 32(c)(1), (3).".

The Commentary to §5C1.2 captioned "Background" is amended by deleting "103-" immediately before "460".

Reason for Amendment: Section 80001(b) of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to promulgate guidelines and policy statements to implement section 80001(a) (providing an exception to otherwise applicable statutory minimum sentences for certain defendants convicted of specified drug offenses). Pursuant to this provision, the Commission promulgated §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) as an emergency amendment, effective September 23, 1994. Under the terms of the congressionally-granted authority, this amendment is temporary unless repromulgated in the next amendment cycle under regularly applicable amendment procedures. See Pub. L. No. 100-182, § 21, set forth as an editorial note under 28 U.S.C. § 994. This amendment repromulgates §5C1.2, as set forth in the 1994 edition of the Guidelines Manual, with minor editorial changes.

In addition, this amendment adds a new subsection to §2D1.1 to implement this provision by providing a two-level decrease in offense level for cases meeting the criteria set forth in §5C1.2(1)-(5).

Effective Date: The effective date of this amendment is November 1, 1995.

516. Amendment: Section 2D1.1(c) is amended in the fifth note immediately following the Drug Quantity Table by deleting the first sentence as follows:

"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.",

and by inserting in lieu thereof:

"In the case of an offense involving marihuana plants, treat each plant, regardless of sex, as equivalent to 100 G of marihuana.".

The Commentary to §2D1.1 captioned "Background" is amended in the fourth paragraph by deleting the first three sentences as follows:

"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.",

and by inserting in lieu thereof:

" For marihuana plants, the Commission has adopted an equivalency of 100 grams per plant, or the actual weight of the usable marihuana, whichever is greater.".

Reason for Amendment: For offenses involving 50 or more marihuana plants, the existing §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) uses an equivalency of one plant = one kilogram of marihuana, reflecting the quantities associated with the five- and ten-year mandatory minimum penalties in 21 U.S.C. § 841. For offenses involving fewer than 50 marihuana plants, the guidelines use an equivalency of one plant = 100 grams of marihuana, unless the weight of the actual marihuana is greater. In actuality, a marihuana plant does not produce a yield of one kilogram of marihuana. The one plant = 100 grams of marihuana equivalency used by the Commission for offenses involving fewer than 50 marihuana plants was selected as a reasonable approximation of the actual average yield of marihuana plants taking into account (1) studies reporting the actual yield of marihuana plants (37.5 to 412 grams depending on growing conditions); (2) that all plants regardless of size are counted for guideline purposes while, in actuality, not all plants will produce useable marihuana (e.g., some plants may die of disease before maturity, and when plants are grown outdoors some plants may be consumed by animals); and (3) that male plants, which are counted for guideline purposes, are frequently culled because they do not produce the same quality of marihuana as do female plants. To enhance fairness and consistency, this amendment adopts the equivalency of 100 grams per marihuana plant for all guideline determinations.

Effective Date: The effective date of this amendment is November 1, 1995.

517. Amendment: Section 2D1.1(c)(10) is amended by deleting:

"20 KG or more of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);
40,000 or more units of Anabolic Steroids.",

and by inserting in lieu thereof:

"40,000 or more units of Schedule I or II Depressants or Schedule III substances.".

Section 2D1.1(c)(11) is amended by deleting:

"At least 10 KG but less than 20 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);
At least 20,000 but less than 40,000 units of Anabolic Steroids.",

and by inserting in lieu thereof:

"At least 20,000 but less than 40,000 units of Schedule I or II Depressants or Schedule III substances.".

Section 2D1.1(c)(12) is amended by deleting:

"At least 5 KG but less than 10 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);
At least 10,000 but less than 20,000 units of Anabolic Steroids.",

and by inserting in lieu thereof:

"At least 10,000 but less than 20,000 units of Schedule I or II Depressants or Schedule III substances.".

Section 2D1.1(c)(13) is amended by deleting:

"At least 2.5 KG but less than 5 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);
At least 5,000 but less than 10,000 units of Anabolic Steroids.",

and by inserting in lieu thereof:

"At least 5,000 but less than 10,000 units of Schedule I or II Depressants or Schedule III substances.".

Section 2D1.1(c)(14) is amended by deleting:

"At least 1.25 KG but less than 2.5 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);
At least 2,500 but less than 5,000 units of Anabolic Steroids;
20 KG or more of Schedule IV substances.",

and inserting in lieu thereof:

"At least 2,500 but less than 5,000 units of Schedule I or II Depressants or Schedule III substances;
40,000 or more units of Schedule IV substances.".

Section 2D1.1(c)(15) is amended by deleting:

"At least 500 G but less than 1.25 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);
At least 1,000 but less than 2,500 units of Anabolic Steroids;
At least 8 KG but less than 20 KG of Schedule IV substances.",

and inserting in lieu thereof:

"At least 1,000 but less than 2,500 units of Schedule I or II Depressants or Schedule III substances;
At least 16,000 but less than 40,000 units of Schedule IV substances.".

Section 2D1.1(c)(16) is amended by deleting:

"At least 125 G but less than 500 G of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);
At least 250 but less than 1,000 units of Anabolic Steroids;
At least 2 KG but less than 8 KG of Schedule IV substances;
20 KG or more of Schedule V substances.",

and inserting in lieu thereof:

"At least 250 but less than 1,000 units of Schedule I or II Depressants or Schedule III substances;
At least 4,000 but less than 16,000 units of Schedule IV substances;
40,000 or more units of Schedule V substances.".

Section 2D1.1(c)(17) is amended by deleting:

"Less than 125 G of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);
Less than 250 units of Anabolic Steroids;
Less than 2 KG of Schedule IV substances;
Less than 20 KG of Schedule V substances.",

and inserting in lieu thereof:

"Less than 250 units of Schedule I or II Depressants or Schedule III substances;
Less than 4,000 units of Schedule IV substances;
Less than 40,000 units of Schedule V substances.".

Section 2D1.1(c) is amended in the notes following the Drug Quantity Table by inserting the following additional note as the sixth note:

"In the case of Schedule I or II Depressants, Schedule III substances (except anabolic steroids), Schedule IV substances, and Schedule V substances, one 'unit' means one pill, capsule, or tablet. If the substance is in liquid form, one 'unit' means 0.5 gms.".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10, Example d, by deleting "28 kilograms" and inserting in lieu thereof "56,000 units"; by deleting "50 kilograms" and inserting in lieu thereof "100,000 units"; and by deleting "100 kilograms" and inserting in lieu thereof "200,000 units".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Tables in the subsection captioned "Secobarbital and Other Schedule I or II Depressants" by deleting " Secobarbital and Other"; and by deleting:

"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",

and inserting in lieu thereof:

"1 unit of a Schedule I or II Depressant = 1 gm of marihuana".

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

"1 gm of a Schedule III Substance
(except anabolic steroids) = 2 gm of marihuana
1 unit of anabolic steroids = 1 gm of marihuana",

and inserting in lieu thereof:

"1 unit of a Schedule III Substance = 1 gm of marihuana".

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

"1 gm of a Schedule IV Substance = 0.125 gm of marihuana",

and inserting in lieu thereof:

"1 unit of a Schedule IV Substance = 0.0625 gm of marihuana".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Tables in the subsection captioned "Schedule V Substances" by deleting:
"1 gm of a Schedule V Substance = 0.0125 gm of marihuana",

and inserting in lieu thereof:

"1 unit of a Schedule V Substance = 0.00625 gm of marihuana".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 11 in the "Typical Weight Per Unit Table" by deleting the caption "Depressants"; and by deleting "Methaqualone* 300 mg".

Reason for Amendment: This amendment modifies §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) with respect to the determination of the offense levels for Schedule I and II Depressants and Schedule III, IV, and V controlled substances by applying the Drug Quantity Table according to the number of pills, capsules, or tablets rather than by the gross weight of the pills, capsules, or tablets. Schedule I and II Depressants and Schedule III, IV, and V substances are almost always in pill, capsule, or tablet

form. The current guidelines use the total weight of the pill, capsule, or tablet containing the controlled substance. This method leads to anomalies because the weight of most pills is determined primarily by the filler rather than the controlled substance. Thus, heavy pills lead to higher offense levels even though there is little or no relationship between gross weight and the potency of the pill. Applying the Drug Quantity Table according to the number of pills will both simplify guideline application and more fairly assess the scale and seriousness of the offense.

Effective Date: The effective date of this amendment is November 1, 1995.

518. Amendment: Section 2D1.1(c) is amended in the notes following the Drug Quantity Table by inserting the following additional notes at the end:

> "Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).
>
> Hashish oil, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (e.g., plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.".

Section 2D1.1(c) is amended by inserting "Notes to Drug Quantity Table:" immediately following the asterisk at the beginning of the notes to the Drug Quantity Table; and by inserting a letter designation immediately before each note in alphabetical order beginning with "(A)".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 1 by inserting the following additional paragraph at the end:

> "Similarly, in the case of marihuana having a moisture content that renders the marihuana unsuitable for consumption without drying (this might occur, for example, with a bale of rain-soaked marihuana or freshly harvested marihuana that had not been dried), an approximation of the weight of the marihuana without such excess moisture content is to be used.".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 8 by inserting the following additional paragraph at the end:

> "Note, however, that if an adjustment from 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 "Application Notes" is amended in Note 10 in the Drug Equivalency Table in the subdivision captioned "Schedule I or II Opiates" by inserting at the end:

"1 gm of Levo-alpha-acetylmethadol (LAAM)= 3 kg of marihuana".

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 deleting:

"1 gm of L-Methamphetamine/Levo-methamphetamine/
L-Desoxyephedrine = 40 gm of marihuana",

and inserting in lieu thereof:

"1 gm of Khat = .01 gm of marihuana".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 12 by deleting:

"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.",

and inserting in lieu thereof:

"In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. For example, a defendant agrees to sell 500 grams of cocaine, the transaction is completed by the delivery of the controlled substance - actually 480 grams of cocaine, and no further delivery is scheduled. In this example, the amount delivered more accurately reflects the scale of the offense. In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that he or she did not intend to provide or was not reasonably capable of providing.".

The Commentary to §2D1.1 captioned "Application Notes" is amended by deleting Note 13 as follows:

"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 "Application Notes" is amended by deleting Note 14 as follows:

"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 960(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.",

and by renumbering the remaining notes accordingly.

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

"18. For purposes of the guidelines, a 'plant' is an organism having leaves and a readily observable root formation (e.g., a marihuana cutting having roots, a rootball, or root hairs is a marihuana plant).".

Reason for Amendment: This is an eight-part amendment. First, this amendment adds definitions of hashish and hashish oil to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) in the notes following the Drug Quantity Table. These terms are not defined by statute or in the existing guidelines, leading to litigation as to which substances are to be classified as hashish or hashish oil, as opposed to marihuana. See United States v. Gravelle, 819 F. Supp. 1076 (S.D. Fla. 1993); United States v. Schultz, 810 F. Supp. 230 (S.D. Ohio 1992).

Second, this amendment clarifies the treatment of marihuana that has a moisture content sufficient to render it unusable without drying (e.g., a bale of marihuana left in the rain or recently harvested marihuana that has not had time to dry). In such cases, using the weight of the wet marihuana can increase the offense level for a factor that bears no relationship to the scale of the offense or the marketable form of the marihuana. Prior to the effective date of the 1993 amendments, two circuits had approved weighing wet marihuana despite the fact that the marihuana was not in a usable form. United States v. Pinedo-Montoya, 966 F.2d 591 (10th Cir. 1992); United States v. Garcia, 925 F.2d 170 (7th Cir. 1991). Although Application Note 1 in the Commentary to §2D1.1, effective November 1, 1993 (pertaining to unusable parts of a mixture or substance) should produce the appropriate result because marihuana must be dried before being used, this type of case is sufficiently distinct to warrant a specific reference in this application note to ensure correct application of the guideline.

Third, this amendment simplifies the Commentary to §2D1.1 by consolidating application notes 8 and 13.

Fourth, this amendment deletes an outdated application note in the Commentary to §2D1.1 pertaining to the classification of d-lysergic acid as a listed precursor chemical.

Fifth, this amendment addresses the issue of what constitutes a marihuana plant. Several circuits have confronted the issue of when a cutting from a marihuana plant becomes a "plant."

The appellate courts generally have held that the term "plant" should be defined by "its plain and ordinary dictionary meaning. . . . [A] marihuana 'plant' includes those cuttings accompanied by root balls." United States v. Edge, 989 F.2d 871, 878 (6th Cir. 1993) (quoting United States v. Eves, 932 F.2d 856, 860 (10th Cir. 1991), appeal after remand, 30 F.3d 134 (6th Cir. 1994)). See also United States v. Malbrough, 922 F.2d 458, 465 (8th Cir. 1990) (acquiescing in the district court's apparent determination that certain marihuana cuttings that did not have their own "root system" should not be counted as plants), cert. denied, 501 S. Ct. 1258 (1991); United States v. Carlisle, 907 F.2d 94, 96 (9th Cir. 1990) (finding that cuttings were plants where each cutting had previous degrees of root formation not clearly erroneous); United States v. Angell, 794 F. Supp. 874, 875 (D. Minn. 1990) (refusing to count as plants marihuana cuttings that have no visible root structure), aff'd in part and rev'd in part, 11 F.3d 806 (8th Cir.), cert. denied, 114 S. Ct. 3747 (1994); United States v. Fitol, 733 F. Supp. 1312, 1316 (D. Minn. 1990) ("individual cuttings, planted with the intent of growing full size plants, and which had grown roots, are 'plants' both within common parlance and within Section 841(b)"); United States v. Speltz, 733 F. Supp. 1311, 1312 (D. Minn. 1990) (small marihuana plants, e.g., cuttings with roots, are nonetheless still marihuana plants), aff'd, 938 F.2d 188 (8th Cir. 1991). Because this issue arises frequently, this amendment adds an application note to the Commentary of §2D1.1 setting forth the definition of a plant for guidelines purposes.

Sixth, this amendment provides equivalencies for two additional controlled substances: (1) khat, and (2) levo-alpha-acetylmethadol (LAAM) in the Drug Equivalency Tables in the Commentary to §2D1.1.

Seventh, this amendment deletes the distinction between d- and l-methamphetamine in the Drug Equivalency Tables in the Commentary to §2D1.1. L-methamphetamine, which is a rather weak form of methamphetamine, is rarely seen and is not made intentionally, but rather results from a botched attempt to produce d-methamphetamine. Under this amendment, l-methamphetamine would be treated the same as d-methamphetamine (i.e., as if an attempt to manufacture or distribute d-methamphetamine). Currently, unless the methamphetamine is specifically tested to determine its form, litigation can result over whether the methamphetamine is l- methamphetamine or d-methamphetamine. In addition, there is another form of methamphetamine (dl-methamphetamine) that is not listed in the Drug Equivalency Table. The listing of l-methamphetamine as a separate form of methamphetamine has led to litigation as to how dl-methamphetamine should be treated. In United States v. Carroll, 6 F.3d 735 (11th Cir. 1993), cert. denied, 114 S. Ct. 1234 (1994), a case in which the Eleventh Circuit held that dl-methamphetamine should be treated as d-methamphetamine, the majority and dissenting opinions both point out the complexity engendered by the current distinction between d- and l- methamphetamine. Under this amendment, all forms of methamphetamine are treated alike, thereby simplifying guideline application.

Eighth, this amendment revises the Commentary to §2D1.1 to provide that in a case involving negotiation for a quantity of a controlled substance, the negotiated quantity is used to determine the offense level unless the completed transaction establishes a different quantity, or the defendant establishes that he or she was not reasonably capable of producing the negotiated amount or otherwise did not intend to produce that amount. Disputes over the interpretation of this application note have produced much litigation. See, e.g., United States v. Tillman,8 F.3d 17 (11th Cir. 1993); United States v. Smiley, 997 F.2d 475 (8th Cir. 1993); United States v. Barnes, 993 F.2d 680 (9th Cir. 1993), cert. denied, 115 S. Ct. 96 (1994); United States v.

Rodriguez, 975 F.2d 999 (3d Cir. 1992); United States v. Christian, 942 F.2d 363 (6th Cir. 1991), cert. denied, 502 U.S. 1045 (1992); United States v. Richardson, 939 F.2d 135 (4th Cir.), 502 U.S. 987 (1991); United States v. Ruiz, 932 F.2d 1174 (7th Cir.), cert. denied, 502 U.S. 849 (1991); United States v. Bradley, 917 F.2d 601 (1st Cir. 1990).

Effective Date: The effective date of this amendment is November 1, 1995.

519. Amendment: Section 2D1.11(d) is amended in the Chemical Quantity Table by deleting "Listed Precursor" wherever it occurs and inserting in lieu thereof "List I"; and by deleting "Listed Essential" wherever it appears and inserting in lieu thereof "List II".

Section 2D1.11(d) is amended in subdivisions (1)-(9) by deleting the line referencing "D-Lysergic Acid" from each subdivision as set forth below:

(1) "200 G or more of D-Lysergic Acid;",

(2) "At least 60 G but less than 200 G of D-Lysergic Acid;",

(3) "At least 20 G but less than 60 G of D-Lysergic Acid;",

(4) "At least 14 G but less than 20 G of D-Lysergic Acid;",

(5) "At least 8 G but less than 14 G of D-Lysergic Acid;",

(6) "At least 2 G but less than 8 G of D-Lysergic Acid;",

(7) "At least 1.6 G but less than 2 G of D-Lysergic Acid;",

(8) "At least 1.2 G but less than 1.6 G of D-Lysergic Acid;",

(9) "Less than 1.2 G of D-Lysergic Acid;".

Section 2D1.11(d) is amended in subdivisions (1)-(9) by inserting the following list I chemicals (formerly Listed Precursor Chemicals) in the appropriate place in alphabetical order by subdivision as follows:

(1) "17.8 KG or more of Benzaldehyde;",
"12.6 KG or more of Nitroethane;",

(2) "At least 5.3 KG but less than 17.8 KG of Benzaldehyde;",
"At least 3.8 KG but less than 12.6 KG of Nitroethane;",

(3) "At least 1.8 KG but less than 5.3 KG of Benzaldehyde;",
"At least 1.3 KG but less than 3.8 KG of Nitroethane;",

(4) "At least 1.2 KG but less than 1.8 KG of Benzaldehyde;",
"At least 879 G but less than 1.3 KG of Nitroethane;",

(5) "At least 712 G but less than 1.2 KG of Benzaldehyde;",
"At least 503 G but less than 879 G of Nitroethane;",

(6) "At least 178 G but less than 712 G of Benzaldehyde;",
"At least 126 G but less than 503 G of Nitroethane;",

(7) "At least 142 G but less than 178 G of Benzaldehyde;",
"At least 100 G but less than 126 G of Nitroethane;",

(8) "At least 107 G but less than 142 G of Benzaldehyde;",
"At least 75 G but less than 100 G of Nitroethane;",

(9) "Less than 107 G of Benzaldehyde;",
"Less than 75 G of Nitroethane;".

Section 2D1.11 is amended in the List 1 Chemical Equivalency Table by inserting the following chemicals, in the appropriate place in alphabetical order:

"1 gm of Benzaldehyde** = 1.124 gm of Ephedrine",
"1 gm of Nitroethane** = 1.592 gm of Ephedrine";

and by deleting "1 gm of D-lysergic acid = 1 gm of Ephedrine".

Section 2D1.11(d) is amended in the notes following the Chemical Quantity Table by deleting Note (A) as follows:

"(A) If more than one listed precursor chemical is involved, use the Precursor Chemical Equivalency Table to determine the offense level.",

and inserting in lieu thereof:

"(A) The List I Chemical Equivalency Table provides a method for combining different precursor chemicals to obtain a single offense level. In a case involving two or more list I chemicals used to manufacture different controlled substances or to manufacture one controlled substance by different manufacturing processes, convert each to its ephedrine equivalency from the table below, add the quantities, and use the Chemical Quantity Table to determine the base offense level. In a case involving two or more list I chemicals used together to manufacture a controlled substance in the same manufacturing process, use the quantity of the single list I chemical that results in the greatest base offense level.";

in Notes (B) and (C) by deleting "listed essential" wherever it appears and inserting in lieu thereof in each instance "list II"; in Note (C) by deleting "listed precursor" and inserting in lieu thereof "list I"; by deleting Note (D) as follows:

"(D) The Precursor Chemical Equivalency Table provides a means for combining different listed precursor chemicals to obtain a single offense level. In cases

involving multiple precursor chemicals, convert each to its ephedrine equivalency from the table below, add the quantities, and apply the Chemical Quantity Table to obtain the applicable offense level.",

and inserting in lieu thereof:

"(D) In a case involving ephedrine tablets, use the weight of the ephedrine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.";

and by deleting "PRECURSOR" and inserting in lieu thereof "(E) LIST I".

Section 2D1.11(d) is amended in the List I Chemical Equivalency Table (formerly the Precursor Chemical Equivalency Table) by inserting "**" immediately after each of the following substances: "Ethylamine", "N-Methylephedrine", "N-Methylpseudoephedrine", "Norpseudoephedrine", "Phenylpropanolamine", "Pseudoephedrine", and "3,4-Methylenedioxyphenyl-2-propanone".

Section 2D1.11(d) is amended in the note following the List I Chemical Equivalency Table (formerly the Precursor Chemical Equivalency Table) designated by two asterisks by deleting "both hydriodic acid and ephedrine" and inserting in lieu thereof:

"(A) hydriodic acid and one of the following: ephedrine, N-methylephedrine, N-methylpseudoephedrine, norpseudoephedrine, phenylpropanolamine, or pseudoephedrine; or (B) ethylamine and 3,4-methylenedioxyphenyl-2-propanone; or (C) benzaldehyde and nitroethane".

The Commentary to §2D1.11 captioned "Application Notes" is amended in Note 3 by deleting "3, 4 methylenedioxphenyl-2-propanone" wherever it appears and inserting in lieu thereof in each instance "methylamine"; and by deleting "LSD, PCP, and other Schedule I and II Hallucinogens" and inserting in lieu thereof "Cocaine and Other Schedule I and II Stimulants".

The Commentary to §2D1.11 captioned "Application Notes" is amended by deleting:

"4. Where there are multiple listed precursor chemicals, the quantities of all listed precursors are added together for purposes of determining the base offense level, except as expressly noted (see Note A to the Chemical Quantity Table). This reflects that only one listed precursor typically is used in a given manufacturing process. For example, in the case of an offense involving 300 grams of piperidine and 800 grams of benzyl cyanide, the piperidine is converted to 600 grams of ephedrine and the benzyl cyanide is converted to 800 grams of ephedrine, using the Precursor Chemical Equivalency Table, for a total of 1400 grams of ephedrine. Applying the Chemical Quantity Table to 1400 grams (1.4 kilograms) of ephedrine results in a base offense level of 22.",

and inserting in lieu thereof:

"4. When two or more list I chemicals are used together in the same manufacturing

process, calculate the offense level for each separately and use the quantity that results in the greatest base offense level. In any other case, the quantities should be added together (using the List I Chemical Equivalency Table) for the purpose of calculating the base offense level.

Examples:

(a) The defendant was in possession of five kilograms of ephedrine and three kilograms of hydriodic acid. Ephedrine and hydriodic acid typically are used together in the same manufacturing process to manufacture methamphetamine. Therefore, the base offense level for each listed chemical is calculated separately and the list I chemical with the higher base offense level is used. Five kilograms of ephedrine result in a base offense level of 24; 300 grams of hydriodic acid result in a base offense level of 14. In this case, the base offense level would be 24.

(b) The defendant was in possession of five kilograms of ephedrine and two kilograms of phenylacetic acid. Although both of these chemicals are used to manufacture methamphetamine, they are not used together in the same manufacturing process. Therefore, the quantity of phenylacetic acid should be converted to an ephedrine equivalency using the List I Chemical Equivalency Table and then added to the quantity of ephedrine. In this case, the two kilograms of phenylacetic acid convert to two kilograms of ephedrine (see List I Chemical Equivalency Table), resulting in a total equivalency of seven kilograms of ephedrine.".

The Commentary to §2D1.11 is amended by deleting "listed precursor" wherever it appears and inserting in lieu thereof "list I"; and by deleting "listed essential" and inserting in lieu thereof in each instance "list II".

The Commentary to §2D1.11 captioned "Background" is amended in the second sentence by deleting "Listed precursor chemicals are critical to the formation of a controlled substance and" and inserting in lieu thereof "List I chemicals are important to the manufacture of a controlled substance and usually".

The Commentary to §2D1.11 captioned "Background" is amended by deleting the last sentence as follows:

"Listed essential chemicals are generally solvents, catalysts, and reagents, and do not become part of the finished product.",

and inserting in lieu thereof:

"List II chemicals are generally used as solvents, catalysts, and reagents.".

Reason for Amendment: The Domestic Chemical Diversion Act of 1993, Pub. L. 103-200, 107 Stat. 2333, changed the designations of the listed chemicals from "listed precursor chemicals" and "listed essential chemicals" to "list I chemicals" and "list II chemicals,"

respectively. This amendment conforms §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) to these statutory changes.

The Act also adds pills containing ephedrine as a list I chemical. Ephedrine itself is a list I chemical under 21 U.S.C. § 802(34). Pills containing ephedrine previously were not covered by the statute and, thus, legally could be purchased "over the counter." Purchases of these pills were sometimes made in large quantities and the pills crushed and processed to extract the ephedrine (which can be used to make methamphetamine). Unlike ephedrine, which is purchased from a chemical company and is virtually 100 percent pure, these tablets contain a substantially lower percentage of ephedrine (about 25 percent). To avoid unwarranted disparity, this amendment adds a note to §2D1.11 providing that the amount of actual ephedrine contained in a pill is to be used in determining the offense level.

In addition, the Act removes three chemicals from, and adds two others to, the listed chemicals controlled under the Controlled Substances Act. Two of the chemicals removed from the list are not currently listed in §2D1.11 because the Commission was aware that they are not used in the manufacture of any controlled substance. The third chemical removed from the list, d-lysergic acid, was listed both as a listed chemical in §2D1.11 and as a controlled substance in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy). This amendment conforms §2D1.11 by deleting all references to d-lysergic acid. The two chemicals added as listed chemicals are benzaldehyde and nitroethane. Both of these chemicals are used to make methamphetamine. The base offense levels for listed chemicals in §2D1.11 are determined by reference to the most common controlled substance the chemical is used to manufacture; consequently, this amendment adds these chemicals to the Chemical Quantity Table based on information provided by the Drug Enforcement Administration regarding their use in the production of methamphetamine.

A number of the chemicals in the Chemical Quantity Table in §2D1.11 are used in the same process to make a controlled substance. A note at the end of the existing Precursor Chemical Equivalency Table addresses this situation for hydriodic acid and ephedrine. This amendment expands this note to cover other chemicals that similarly are used together.

In addition, this amendment corrects Application Note 3 of the Commentary to §2D1.11 with respect to an example of a listed chemical that is used with P2P to manufacture methamphetamine and a reference to a subdivision of the Drug Equivalency Tables in the Commentary to §2D1.1.

Effective Date: The effective date of this amendment is November 1, 1995.

520. Amendment: Section 2D1.12(a) is amended by inserting "(Apply the greater)" immediately after "Base Offense Level"; and by deleting "12" and inserting in lieu thereof:

"(1) 12, if the defendant intended to manufacture a controlled substance or knew or believed the prohibited equipment was to be used to manufacture a controlled substance; or

(2) 9, if the defendant had reasonable cause to believe the prohibited equipment was to be used to manufacture a controlled substance.".

Reason for Amendment: The Domestic Chemical Diversion Act of 1993, Pub. L. 103-200, 107 Stat. 2333, broadens the prohibition in 21 U.S.C. § 843(a) to cover possessing, manufacturing, distributing, exporting, or importing three-neck, round-bottom flasks, tableting machines, encapsulating machines, or gelatin capsules having reasonable cause to believe they will be used to manufacture a controlled substance. Section 2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment; Attempt or Conspiracy) applies to this conduct. Consistent with the treatment of similar conduct under §§2D1.11(b)(2) and 2D1.13(b)(2), this amendment provides an alternative base offense level in §2D1.12 to address the case in which the defendant had reasonable cause to believe, but not actual knowledge or belief, that the equipment was to be used to manufacture a controlled substance.

Effective Date: The effective date of this amendment is November 1, 1995.

521. Amendment: Chapter Two, Part H, Subpart 1 is amended by deleting:

"Introductory Commentary

This subpart covers violations of civil rights statutes that typically penalize conduct involving death or bodily injury more severely than discriminatory or intimidating conduct not involving such injury.

The addition of two levels to the offense level applicable to the underlying offense in this subpart reflects the fact that the harm involved both the underlying conduct and activity intended to deprive a person of his civil rights. An added penalty is imposed on an offender who was a public official at the time of the offense to reflect the likely damage to public confidence in the integrity and fairness of government, and the added likely force of the threat because of the official's involvement.".

Sections 2H1.1, 2H1.3, 2H1.4, and 2H1.5 are deleted in their entirety as follows:

"§2H1.1. Conspiracy to Interfere with Civil Rights; Going in Disguise to Deprive of Rights

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

(1) 15; 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. '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.

   '2 plus the offense level applicable to any underlying offense' means 2 levels above the offense level (base offense level plus any applicable specific offense characteristics and cross references) from the offense guideline in Chapter Two that most closely corresponds to the underlying offense. For example, if the underlying offense was second degree murder, which under §2A1.2 has an offense level of 33, '2 plus the offense level applicable to any underlying offense' would be 33 + 2 = 35. If the underlying offense was assault, criminal sexual conduct, kidnapping, abduction or unlawful restraint, the offense level from the guideline for the most comparable offense in §§2A2.1-2A4.2 (Assault, Criminal Sexual Abuse, and Kidnapping, Abduction, or Unlawful Restraint) would first be determined, and 2 levels then would be added. If the underlying offense was damage to property by means of arson or an explosive device, the offense level from §2K1.4 (Arson; Property Damage By Use of Explosives) would first be determined and 2 levels would be added. If the offense was property damage by other means, the offense level from §2B1.3 (Property Damage or Destruction) would first be determined and 2 levels would be added. If the offense was a conspiracy or attempt to commit arson, '2 plus the offense level applicable to any underlying offense' would be the offense level from the guideline applicable to a conspiracy or attempt to commit arson plus 2 levels.

   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.

2. Where the adjustment in §2H1.1(b)(1) is applied, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Background: This section applies to intimidating activity by various groups, including formally and informally organized groups as well as hate groups. 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.

§2H1.3. Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination; Damage to Religious Real Property

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

(1) 10, if no injury occurred; or

(2) 15, if injury occurred; or

(3) 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 Provisions: 18 U.S.C. §§ 245, 247; 42 U.S.C. § 3631. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. '2 plus the offense level applicable to any underlying offense' is defined in the Commentary to §2H1.1.

2. 'Injury' means 'bodily injury,' 'serious bodily injury,' or 'permanent or life-threatening bodily injury' as defined in the Commentary to §1B1.1 (Application Instructions).

3. Where the adjustment in §2H1.3(b)(1) is applied, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

4. In the case of a violation of 42 U.S.C. § 3631, apply this guideline where the offense involved the threat or use of force. Otherwise, apply §2H1.5.

Background: The statutes covered by this guideline provide federal protection for the exercise of civil rights in a variety of contexts (e.g., voting, employment, public accommodations, etc.). The base offense level in §2H1.3(a) reflects that the threat or use of force is inherent in the offense. The maximum term of imprisonment authorized by statute is one year if no bodily injury results, ten years if bodily injury results, and life imprisonment if death results.

§2H1.4. Interference with Civil Rights Under Color of Law

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

(1) 10; or

(2) 6 plus the offense level applicable to any underlying offense.

Commentary

Statutory Provision: 18 U.S.C. § 242.

Application Notes:

1. '6 plus the offense level applicable to any underlying offense' means 6 levels above the offense level for any underlying criminal conduct. See the discussion in the Commentary to §2H1.1.

2. Do not apply the adjustment from §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Background: This maximum term of imprisonment authorized by 18 U.S.C. § 242 is one year if no bodily injury results, ten years if bodily injury results, and life imprisonment if death results. A base offense level of 10 is prescribed at §2H1.4(a)(1) providing a guideline sentence near the one-year statutory maximum for cases not resulting in death or bodily injury because of the compelling public interest in deterring and adequately punishing those who violate civil rights under color of law. The Commission intends to recommend that this one-year statutory maximum penalty be increased. An alternative base offense level is provided at §2H1.4(a)(2). 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).

Enhancement under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) is inappropriate because the base offense level in §2H1.4(a) reflects that the abuse of actual or purported legal authority is inherent in the offense.

§2H1.5. Other Deprivations of Rights or Benefits in Furtherance of Discrimination

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

(1) 6; 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. § 246.

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 §2H1.5(b)(1) is applied, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Background: Violations of the statutes covered by this provision do not necessarily involve the use of force or threatening conduct or violations by public officials. Accordingly, the minimum base offense level (level 6) provided is lower than that of the other guidelines in this subpart.".

A replacement guideline with accompanying commentary is inserted as §2H1.1 (Offenses Involving Individual Rights).

Section 3A1.1 (Vulnerable Victim) is deleted in its entirety as follows:

"§3A1.1. Vulnerable Victim

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

Commentary

Application Notes:

1. This adjustment applies to offenses where an unusually vulnerable victim is made a target of criminal activity by the defendant. The adjustment would apply, for example, in a fraud case where the defendant marketed an ineffective cancer cure or in a robbery where the defendant selected a handicapped victim. But it would not apply in a case where the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile. Similarly, for example, a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank.

2. Do not apply this adjustment if the offense guideline specifically incorporates this factor. 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.".

A replacement guideline with accompanying commentary is inserted as §3A1.1 (Hate Crime Motivation or Vulnerable Victim).

The Commentary to §2H4.1 captioned "Application Note" is amended in Note 1 by deleting "2 plus the offense" and inserting in lieu thereof "Offense".

Reason for Amendment: This is a five-part amendment. First, the amendment adds an additional subsection to §3A1.1 (Vulnerable Victim) to implement the directive contained in Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994 by providing a three-level increase in the offense level for offenses that are "hate crimes." Second, the amendment consolidates §§2H1.1 (Offenses Involving Individual Rights), 2H1.3 (Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination; Damage to Religious Real Property), 2H1.4 (Interference with Civil Rights Under Color of Law), and 2H1.5 (Other Deprivations of Rights Benefits in Furtherance of Discrimination) into a revised §2H1.1 (Offenses Involving Individual Rights). This revised guideline provides greater consistency in offense levels for similar conduct, reflects the additional enhancement now contained in §3A1.1, and better reflects the seriousness of the underlying conduct. Third, the amendment references violations of 18 U.S.C. § 248 (the Freedom of Access to Clinic Entrances Act of 1994, Pub. L. 103-259, 108 Stat. 694) to the consolidated §2H1.1. Fourth, the amendment clarifies the operation of §3A1.1 with respect to a vulnerable victim. Fifth, the amendment addresses the directive to the Commission in section 240002 of the Violent Crime Control and Law Enforcement Act of 1994 (pertaining to elderly victims of crimes of violence).

Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to provide a minimum enhancement of three levels for offenses that the finder of fact at trial determines are hate crimes. This directive also instructs the Commission to ensure that there is reasonable consistency with other guidelines and that duplicative punishments for the same offense are avoided. The congressional directive in section 280003 requires that the three-level hate crimes enhancement apply where "the finder of fact at trial determines beyond a reasonable doubt" that the offense of conviction was a hate crime. This amendment makes the enhancement applicable if either the finder of fact at trial or, in the case of a guilty or nolo contendere plea, the court at sentencing determines that the offense was a hate crime. By broadening the applicability of the congressionally mandated enhancement, this amendment will avoid unwarranted sentencing disparity based on the mode of conviction. The

Commission's general guideline promulgation authority, see 28 U.S.C. § 994, permits such a broadening of the enhancement.

The addition of a generally applicable Chapter Three hate crimes enhancement requires amendment of the civil rights offense guidelines to avoid duplicative punishments. In addition, to further the Commission's goal of simplifying the operation of the guidelines, the proposed amendment consolidates the four current civil rights offense guidelines into one guideline and adjusts these guidelines to take into account the new enhancement under §3A1.1(a).

The Freedom of Access to Clinic Entrances Act of 1994 makes it a crime to interfere with access to reproductive services or to interfere with certain religious activities. This Act criminalizes a broad array of conduct, from non-violent obstruction of the entrance to a clinic to murder. The amendment treats these violations in the same way as other offenses involving individual rights.

Section 240002 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to ensure that the guidelines provide sufficiently stringent penalties for crimes of violence against elderly victims. Upon review of the guidelines, the Commission determined that the penalties currently provided generally appear appropriate; however, this amendment strengthens the Commentary to §3A1.1 in one area by expressly providing a basis for an upward departure if both the current offense and a prior offense involved a vulnerable victim (including an elderly victim), regardless of the type of offense.

Finally, Section 250003 of the Violent Control and Law Enforcement Act of 1994 directs the Commission to review, and if necessary, amend the sentencing guidelines to ensure that victim-related adjustments for fraud offenses against older victims are adequate. Section 250003 also directs the Commission to study and report to the Congress on this issue. See Report to Congress: Adequacy of Penalties for Fraud Offenses Involving Elderly Victims (March 13, 1995). Although the Commission found that the current guidelines generally provided adequate penalties in these cases, it noted some inconsistency in the application of §3A1.1 regarding whether this adjustment required proof that the defendant had "targeted the victim on account of the victim's vulnerability." This amendment revises the Commentary of §3A1.1 to clarify application with respect to this issue.

Effective Date: The effective date of this amendment is November 1, 1995.

522. Amendment: Section §2K2.1(a)(1) is amended by deleting:

> "defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense, and the instant offense involved a firearm listed in 26 U.S.C. § 5845(a)",

and inserting in lieu thereof:

> "offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30), and the defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense".

Section §2K2.1(a)(3) is amended by deleting:

> "defendant had one prior felony conviction of either a crime of violence or a controlled substance offense, and the instant offense involved a firearm listed in 26 U.S.C. § 5845(a)",

and inserting in lieu thereof:

> "offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30), and the defendant had one prior conviction of either a crime of violence or controlled substance offense".

Section §2K2.1(a)(4)(B) is amended by deleting "listed in 26 U.S.C. § 5845(a)" and inserting in lieu thereof "described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30)".

Section 2K2.1(a)(5) is amended by deleting "listed in 26 U.S.C. § 5845(a)" and inserting in lieu thereof "described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30)".

Section 2K2.1(a)(8) is amended by deleting "or (m)" and by inserting in lieu thereof "(m), (s), (t), or (x)(1)".

The Commentary to §2K2.1 captioned "Statutory Provisions" is amended by deleting "(r)" and inserting in lieu thereof "(r)-(w), (x)(1)"; and by deleting "(g)" and inserting in lieu thereof "(g), (h), (j)-(n)".

The Commentary to §2K2.1 captioned "Application Notes" is amended by deleting:

> "3. 'Firearm listed in 26 U.S.C. § 5845(a)' includes: (i) any short-barreled rifle or shotgun or any weapon made therefrom; (ii) a machinegun; (iii) a silencer; (iv) a destructive device; or (v) any 'other weapon,' as that term is defined by 26 U.S.C. § 5845(e). A firearm listed in 26 U.S.C. § 5845(a) does not include unaltered handguns or regulation-length rifles or shotguns. For a more detailed definition, refer to 26 U.S.C. § 5845.",

and inserting in lieu thereof:

> "3. A 'firearm described in 26 U.S.C. § 5845(a)' includes: (i) a shotgun having a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; a rifle having a barrel or barrels of less than 16 inches in length; or a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (ii) a machinegun; (iii) a silencer; (iv) a destructive device; and (v) certain unusual weapons defined in 26 U.S.C. § 5845(e) (that are not conventional, unaltered handguns, rifles, or shotguns). For a more detailed definition, refer to 26 U.S.C. § 5845.
>
> A 'firearm described in 18 U.S.C. § 921(a)(30)' (pertaining to semiautomatic

assault weapons) does not include a weapon exempted under the provisions of 18 U.S.C. § 922(v)(3).".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 6 by deleting:

"or (v) being an alien, is illegally or unlawfully in the United States",

and inserting in lieu thereof:

"(v) being an alien, is illegally or unlawfully in the United States; or (vi) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child as defined in 18 U.S.C. § 922(d)(8)".

The Commentary to §2K2.1 captioned "Application Notes" is amended by deleting:

"12. If the defendant is convicted under 18 U.S.C. § 922(i), (j), or (k), or 26 U.S.C. § 5861(g) or (h) (offenses involving stolen firearms or ammunition), and is convicted of no other offense subject to this guideline, do not apply the adjustment in subsection (b)(4) because the base offense level itself takes such conduct into account.".

and inserting in lieu thereof:

"12. If the only offense to which §2K2.1 applies is 18 U.S.C. § 922 (i), (j), or (u), 18 U.S.C. § 924(j) or (k), or 26 U.S.C. § 5861(g) or (h) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the adjustment in subsection (b)(4) unless the offense involved a firearm with an altered or obliterated serial number. This is because the base offense level takes into account that the firearm or ammunition was stolen.

Similarly, if the only offense to which §2K2.1 applies is 18 U.S.C. § 922(k) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the adjustment in subsection (b)(4) unless the offense involved a stolen firearm or stolen ammunition. This is because the base offense level takes into account that the firearm had an altered or obliterated serial number.".

Reason for Amendment: This is a five-part amendment. First, the amendment revises §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to provide increased offense levels for possession of a semiautomatic assault weapon that correspond to the offense levels currently provided for possession of machineguns and other firearms described in 26 U.S.C. § 5845(a). Second, the amendment addresses section 110201 of the Violent Crime Control Law Enforcement Act of 1994 by providing an offense level of six for the misdemeanor portion of 18 U.S.C. § 922(x)(1) (involving sale or transfer of a handgun or ammunition to a juvenile).

For an offense under the felony portion of 18 U.S.C. § 922(x)(1) (involving the sale or transfer of a handgun or handgun ammunition to a juvenile knowing or having reasonable cause to believe that the handgun or ammunition was intended to be used in a crime), the enhancement in subsection (b)(5) will provide a minimum offense level of 18. Third, the amendment addresses section 110401 of the Violent Crime Control and Law Enforcement Act of 1994 by adding to the definition of a "prohibited person" in §2K2.1 a person under the court order described in that section of the Act. Fourth, the amendment provides an offense level of six for the misdemeanors set forth in 18 U.S.C. § 922 (s) and (t) (involving violations of the Brady Act). Fifth, the amendment clarifies that Application Note 12 in §2K2.1 applies only to cases in which the base offense level is determined under §2K2.1(a)(7).

Effective Date: The effective date of this amendment is November 1, 1995.

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

"a sentence at or near the maximum of the applicable guideline range may be warranted",

and inserting in lieu thereof:

"an upward departure may be warranted. See §4A1.3 (Adequacy of Criminal History Category)".

Reason for Amendment: This amendment revises §2L1.2 (Unlawfully Entering or Remaining in the United States) to authorize the court to consider an upward departure in the case of a defendant with repeated prior instances of deportation not resulting in a criminal conviction.

Effective Date: The effective date of this amendment is November 1, 1995.

524. Amendment: Section 2L2.1(b)(2) is amended by deleting "sets of documents" and inserting in lieu thereof "documents"; and by deleting "Sets of Documents" and inserting in lieu thereof "Documents".

Section 2L2.1(b) is amended by inserting the following additional subdivision:

"(3) If the defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws, increase by 4 levels.".

The Commentary to §2L2.1 captioned "Application Notes" is amended in Note 2 by inserting "of documents" immediately before "intended"; and by deleting "documents as one set" and inserting in lieu thereof "set as one document".

The Commentary to §2L2.1 captioned "Application Notes" is amended by inserting the following additional note:

"3. Subsection (b)(3) provides an enhancement if the defendant knew, believed, or

had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws. If the defendant knew, believed, or had reason to believe that the felony offense to be committed was of an especially serious type, an upward departure may be warranted.".

Section 2L2.2 is amended by inserting the following additional subsection:

"(c) Cross Reference

(1) If the defendant used a passport or visa in the commission or attempted commission of a felony offense, other than an offense involving violation of the immigration laws, apply --

(A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that felony offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.".

Reason for Amendment: This is a three-part amendment. First, this amendment provides an enhancement in §2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law) if the defendant trafficked in a passport or visa knowing, believing, or having reason to believe that the passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws. Second, this amendment corrects a technical error in §2L2.1(b)(2). Third, this amendment adds a cross reference to §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport) that addresses the case of a defendant who uses a passport or visa in the commission or attempted commission of a felony offense, other than an offense involving violation of the immigration laws.

Effective Date: The effective date of this amendment is November 1, 1995.

525. Amendment: Section 2P1.2(a)(2) is amended by inserting "methamphetamine," immediately following "PCP,".

Section 2P1.2(a)(3) is amended by inserting "methamphetamine," immediately following "PCP,".

Section 2P1.2 is amended by deleting subsection (c)(1) as follows:

"(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.",

and inserting in lieu thereof:

"(1) If the object of the offense was the distribution of a controlled substance, apply the offense level from §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy). *Provided*, that if the defendant is convicted under 18 U.S.C. § 1791(a)(1) and is punishable under 18 U.S.C. § 1791(b)(1), and the resulting offense level is less than level 26, increase to level 26.".

Reason for Amendment: This amendment conforms the offense level for methamphetamine offenses in a correctional or detention facility to that of other controlled substance offenses committed in a correctional or detention facility that have the same statutory maximum penalty. This change reflects the increase in the maximum penalty for methamphetamine offenses in section 90101 of the Violent Crime Control and Law Enforcement Act of 1994. In addition, the amendment expands the cross reference in §2P1.2(c)(1) to cover distribution of all controlled substances in a correctional or detention facility.

Effective Date: The effective date of this amendment is November 1, 1995.

526. Amendment: Chapter Three, Part A, is amended by inserting an additional section as §3A1.4 (International Terrorism).

Section 5K2.15 (Terrorism) is deleted in its entirety as follows:

"§5K2.15. Terrorism (Policy Statement)

If the defendant committed the offense in furtherance of a terroristic action, the court may increase the sentence above the authorized guideline range.".

Reason for Amendment: Section 120004 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to provide an appropriate enhancement for any felony that involves or is intended to promote international terrorism. The amendment addresses this directive by adding a Chapter Three enhancement at §3A1.4 (International Terrorism) in place of the upward departure provision at §5K2.15 (Terrorism).

Effective Date: The effective date of this amendment is November 1, 1995.

527. Amendment: Section 3B1.4 is deleted in its entirety as follows:

"§3B1.4. In any other case, no adjustment is made for role in the offense.

Commentary

Many offenses are committed by a single individual or by individuals of roughly

equal culpability so that none of them will receive an adjustment under this Part. In addition, some participants in a criminal organization may receive increases under §3B1.1 (Aggravating Role) while others receive decreases under §3B1.2 (Mitigating Role) and still other participants receive no adjustment.".

A new §3B1.4 (Using a Minor To Commit a Crime) is inserted in lieu thereof.

Reason for Amendment: This amendment implements the directive in Section 140008 of the Violent Crime Control and Law Enforcement Act of 1994 (pertaining to the use of a minor in the commission of an offense) in a slightly broader form by adding a new §3B1.4 (Using a Minor to Commit a Crime). The existing §3B1.4 (untitled) is deleted as unnecessary.

Effective Date: The effective date of this amendment is November 1, 1995.

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

"28 U.S.C. § 994(h) mandates that the Commission assure that certain 'career' offenders, as defined in the statute, receive a sentence of imprisonment 'at or near the maximum term authorized.' Section 4B1.1 implements this mandate. The legislative history of this provision suggests that the phrase 'maximum term authorized' should be construed as the maximum term authorized by statute. See S. Rep. 98-225, 98th Cong., 1st Sess. 175 (1983), 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).",

and inserting in lieu thereof:

"Section 994(h) of Title 28, United States Code, mandates that the Commission assure that certain 'career' offenders receive a sentence of imprisonment 'at or near the maximum term authorized.' Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28 U.S.C. § 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid 'unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . .' 28 U.S.C. § 991(b)(1)(B). The Commission's refinement of this definition over time is consistent with Congress's choice of a directive to the Commission rather than a mandatory minimum sentencing statute ('The [Senate Judiciary] Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure consistent and rational implementation for the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers.' S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

The legislative history of this provision suggests that the phrase 'maximum term authorized' should be construed as the maximum term authorized by statute. See S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983); 128 Cong. Rec. 26,511-12 (1982) (text of

'Career Criminals' amendment by Senator Kennedy); id. at 26,515 (brief summary of amendment); id. at 26,517-18 (statement of Senator Kennedy).".

Application Note 1 of the Commentary to §4B1.2 is repromulgated without change.

Reason for Amendment: This amendment repromulgates Application Note 1 of the Commentary to §4B1.2 (Definition of Terms Used in Section 4B1.1) and inserts additional background commentary in §4B1.1 (Career Offender) explaining the Commission's rationale and authority for its implementation of this guideline. The amendment responds to a decision by the United States Court of Appeals for the District of Columbia Circuit in United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993). In Price, the court invalidated application of the career offender guideline to a defendant convicted of a drug conspiracy because 28 U.S.C. § 994(h), which the Commission cites as the mandating authority for the career offender guideline, does not expressly refer to inchoate offenses. The court indicated that it did not foreclose Commission authority to include conspiracy offenses under the career offender guideline by drawing upon its broader guideline promulgation authority in 28 U.S.C. § 994(a). See also United States v. Mendoza-Figueroa, 28 F.3d 766 (8th Cir. 1994), vacated (Sept. 2, 1994); United States v. Bellazerius, 24 F.3d 698 (5th Cir.), cert. denied, 115 S. Ct. 375 (1994). Other circuits have rejected the Price analysis and upheld the Commission's definition of "controlled substance offense." For example, the Ninth Circuit considered the legislative history to 994(h) and determined that the Senate Report clearly indicated that 994(h) was not the sole enabling statute for the career offender guidelines. United States v. Heim, 15 F.3d 830 (9th Cir.), cert. denied, 115 S. Ct. 55 (1994). See also United States v. Hightower, 25 F.3d 182 (3d Cir.), cert. denied, 115 S. Ct. 370 (1994); United States v. Damerville, 27 F.3d 254 (7th Cir.), cert. denied, 115 S. Ct. 445 (1994); United States v. Allen, 24 F.3d 1180 (10th Cir.), cert. denied, 115 S. Ct. 493 (1994); United States v. Baker, 16 F.3d 854 (8th Cir. 1994); United States v. Linnear, 40 F.3d 215 (7th Cir. 1994); United States v. Kennedy, 32 F.3d 876 (4th Cir. 1994), cert. denied, 115 S. Ct. 939 (1995); United States v. Piper, 35 F.3d 611 (1st Cir. 1994), cert. denied, 115 S. Ct. 1118 (1995).

Effective Date: The effective date of this amendment is November 1, 1995.

529. Amendment: The Commentary to §5D1.1 captioned "Application Notes" is amended by deleting Note 1 as follows:

"Subsection 5D1.1(a) requires imposition of supervised release following any sentence of imprisonment for a term of more than one year or if required by a specific statute. While there may be cases within this category that do not require post release supervision, these cases are the exception and may be handled by a departure from this guideline.",

and inserting in lieu thereof:

"Under subsection (a), the court is required to impose a term of supervised release to follow imprisonment if a sentence of imprisonment of more than one year is imposed or if a term of supervised release is required by a specific statute. The court may depart from this guideline and not impose a term of supervised release if it determines that supervised release is neither required by statute nor required for any of the following

reasons: (1) to protect the public welfare; (2) to enforce a financial condition; (3) to provide drug or alcohol treatment or testing; (4) to assist the reintegration of the defendant into the community; or (5) to accomplish any other sentencing purpose authorized by statute.".

The Commentary to §5D1.1 captioned "Application Notes" is amended by deleting Note 2 as follows:

"2. Under §5D1.1(b), the court may impose a term of supervised release in cases involving imprisonment for a term of one year or less. The court may consider the need for a term of supervised release to facilitate the reintegration of the defendant into the community; to enforce a fine, restitution order, or other condition; or to fulfill any other purpose authorized by statute.",

and inserting in lieu thereof:

"2. Under subsection (b), the court may impose a term of supervised release to follow a term of imprisonment of one year or less for any of the reasons set forth in Application Note 1.".

Section 5D1.2 is amended by deleting:

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

and by redesignating subsection (b) as subsection (a).

Section 5D1.2(a) (formerly §5D1.2(b)) is amended by deleting "Otherwise, when" and inserting in lieu thereof "If".

Section 5D1.2 is amended by inserting the following additional subsection:

"(b) *Provided*, that the term of supervised release imposed shall in no event be less than any statutorily required term of supervised release.".

The Commentary to §5D1.2 captioned "Background" is amended in the second sentence by deleting "(a)" and inserting in lieu thereof "(b)"; and by deleting the third sentence as follows:

"Subsection (b) applies to all other statutes.".

Reason for Amendment: This amendment sets forth with greater specificity the circumstances under which the court may depart from the requirements of §5D1.1 (Imposition of a Term of Supervised Release) and impose no term of supervised release. In addition, the amendment deletes, as unnecessary, the requirement in §5D1.2 (Term of Supervised Release) of a term of supervised release of three to five years whenever a statute requires any term of supervised release. Instead, the amendment provides that, in the case of a statute requiring a term of supervised release, the length of the term of supervised release shall be determined by

the class of felony of which the defendant was convicted, but shall not be less than any minimum term of supervised release required by statute.

Effective Date: The effective date of this amendment is November 1, 1995.

530. Amendment: Section 5E1.1(a)(2) is amended by deleting "49 U.S.C. § 1472(h), (i), (j), or (n)" and inserting in lieu thereof "49 U.S.C. § 46312, § 46502, or § 46504".

The Commentary to §5E1.1 captioned "Background" is amended in the first paragraph by deleting "and of designated subdivisions of 49 U.S.C. § 1472" and inserting in lieu thereof "or 49 U.S.C. § 46312, § 46502, or § 46504".

The Commentary to §5E1.1 captioned "Background" is amended in the second paragraph by deleting "§ 1472(h), (i), (j), or (n)" wherever it appears and inserting in lieu there of in each instance "§ 46312, § 46502, or § 46504".

The Commentary to §5E1.1 captioned "Background" is amended in the fourth paragraph by deleting "Rule 32(c)(2)(D)" and inserting in lieu thereof "Rule 32(b)(4)(D)".

The Commentary to §5E1.1 is amended by inserting the following immediately before "Background":

"Application Note:

1. In the case of a conviction under certain statutes, additional requirements regarding restitution apply. See 18 U.S.C. §§ 2248 and 2259 (applying to convictions under 18 U.S.C. §§ 2241-2258 for sexual-abuse offenses and sexual exploitation of minors); 18 U.S.C. § 2327 (applying to convictions under 18 U.S.C. §§ 1028-1029, 1341-1344 for telemarketing-fraud offenses); 18 U.S.C. § 2264 (applying to convictions under 18 U.S.C. §§ 2261-2262 for domestic-violence offenses). To the extent that any of the above-noted statutory provisions conflict with the provisions of this guideline, the applicable statutory provision shall control.".

Reason for Amendment: Section 40113 of the Violent Crime Control and Law Enforcement Act of 1994 requires "mandatory" restitution for offenses involving sexual abuse and sexual exploitation of children under 18 U.S.C. §§ 2241-2258. Sections 40221 and 250002 add similar "mandatory" restitution provisions for offenses involving domestic violence (18 U.S.C. § 2264) and telemarketing fraud (18 U.S.C. § 2327). These provisions also require that compliance with a restitution order be a condition of probation or supervised release, have broader definitions of loss than 18 U.S.C. § 3663, and apply "notwithstanding section 3663, and in addition to any civil or criminal penalty authorized by law." This amendment adds commentary to §5E1.1 (Restitution) to alert courts to these statutory provisions.

In addition, this amendment conforms §5E1.1 to the redesignation of 49 U.S.C. § 1472(h), (i), (j), and (n) as 49 U.S.C. §§ 46312, 46502(a), (b), and 46504, and the redesignation of Rule 32(c)(2)(D) as Rule 32(b)(4)(D).

Effective Date: The effective date of this amendment is November 1, 1995.

531. Amendment: Chapter Five, Part K, Subpart Two is amended by inserting an additional policy statement as §5K2.17 (High-Capacity, Semiautomatic Firearms).

Reason for Amendment: This amendment addresses the directive in section 110501 of the Violent Crime Control and Law Enforcement Act of 1994 to provide an appropriate enhancement for a crime of violence or drug trafficking crime if a semiautomatic firearm is involved.

According to data reviewed by the Commission, semiautomatic firearms are used in 50-70 percent of offenses involving a firearm. Thus, offenses involving a semiautomatic firearm represent the typical or "heartland" case under the guidelines. Consequently, the firearms enhancements in the guidelines for crimes of violence and drug trafficking can be considered to take into account the fact that firearms involved in these offenses typically are semiautomatic. Moreover, the "firepower" or "dangerousness" of semiautomatic firearms, compared to other types of firearms, varies substantially with caliber and magazine capacity. For example, a .25 caliber, six-shot semiautomatic pistol is not considered as having as much firepower as a .38 caliber, six-shot revolver or a .357 magnum, six-shot revolver. A nine-millimeter semiautomatic pistol fires a somewhat more powerful cartridge than a .38 caliber revolver and a somewhat less powerful cartridge than a .357 magnum revolver. But some nine-millimeter semiautomatic pistols hold from 14-18 cartridges, compared to six cartridges for a revolver. A high magazine capacity, nine-millimeter semiautomatic pistol can be said to have significantly more firepower than a revolver because it can fire a significantly larger number of shots without reloading.

If harm actually results (e.g., death or bodily injury), the guidelines generally take that harm into account directly. Consequently, in considering any distinction between semiautomatic firearms and other firearms, the issue is whether there is any significant difference in the risk of harm. The difference in the risk of harm also varies widely with the circumstances of the offense. For example, in a robbery at very close range, the difference in the likelihood of death or bodily injury between a revolver and semiautomatic pistol would seem to be small. In contrast, in a drive-by shooting the greater firepower of a semiautomatic weapon likely would have a more significant effect on the likelihood of death or injury.

After considering the above factors, the Commission determined that the most appropriate approach at this time was to provide a specific basis for an upward departure when a high-capacity semiautomatic firearm is possessed in connection with a crime of violence or drug trafficking offense, thereby allowing the courts the flexibility to take this factor into account as appropriate in the circumstances of the particular case.

Effective Date: The effective date of this amendment is November 1, 1995.

532. Amendment: Chapter Five, Part K, Subpart Two is amended by inserting an additional policy statement as §5K1.18 (Violent Street Gangs).

Reason for Amendment: This amendment expressly provides a basis for an upward departure in the case of a defendant subject to a statutorily enhanced maximum penalty under 18 U.S.C.

§ 521 (pertaining to criminal street gangs), as enacted by section 150000 of the Violent Crime and Law Enforcement Act of 1994.

Effective Date: The effective date of this amendment is November 1, 1995.

533. Amendment: Section 7B1.3(g)(2) is amended by deleting "the defendant may, to the extent permitted by law, be ordered to recommence supervised release upon release from imprisonment" and inserting in lieu thereof:

> "the court may include a requirement that the defendant be placed on a term of supervised release upon release from imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release. 18 U.S.C. § 3583(h)".

The Commentary to §7B1.3 captioned "Application Notes" is amended in Note 2 by deleting:

> ". This statute, however, neither expressly authorizes nor precludes a court from ordering that a term of supervised release recommence after revocation. Under §7B1.3(g)(2), the court may order, to the extent permitted by law, the recommencement of a supervised release term following revocation",

and inserting in lieu thereof:

> ", (g)-(i). Under 18 U.S.C. § 3583(h) (effective September 13, 1994), the court, in the case of revocation of supervised release and imposition of less than the maximum imposable term of imprisonment, may order an additional period of supervised release to follow imprisonment".

The Commentary to §7B1.3 captioned "Application Notes is amended by deleting:

> "3. Subsection (c) provides for the use of certain alternatives to imprisonment upon revocation. It is to be noted, however, that a court may decide that not every alternative is authorized by statute in every circumstance. For example, in United States v. Behnezhad, 907 F.2d 896 (9th Cir. 1990), the Ninth Circuit held that where a term of supervised release was revoked there was no statutory authority to impose a further term of supervised release. Under this decision, in the case of a revocation of a term of supervised release, an alternative that is contingent upon imposition of a further term of supervised release (e.g., a period of imprisonment followed by a period of community confinement or detention as a condition of supervised release) cannot be implemented. The Commission has transmitted to the Congress a proposal for a statutory amendment to address this issue.";

and by renumbering the remaining notes accordingly.

The Commentary to §7B1.4 captioned "Application Notes" is amended by deleting:

"5. Under 18 U.S.C. § 3565(a), upon a finding that a defendant violated a condition of probation by being in possession of a controlled substance, the court is required 'to revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence.' Under 18 U.S.C. § 3583(g), upon a finding that a defendant violated a condition of supervised release by being in possession of a controlled substance, the court is required 'to terminate supervised release and sentence the defendant to serve in prison not less than one-third of the term of supervised release.' The Commission leaves to the court the determination of whether evidence of drug usage established solely by laboratory analysis constitutes 'possession of a controlled substance' as set forth in 18 U.S.C. §§ 3565(a) and 3583(g).

6. Under 18 U.S.C. § 3565(b), upon a finding that a defendant violated a condition of probation by the actual possession of a firearm, the court is required 'to revoke the sentence of probation and impose any other sentence that was available ... at the time of initial sentencing.'",

and inserting in lieu thereof:

"5. Upon a finding that a defendant violated a condition of probation or supervised release by being in possession of a controlled substance or firearm or by refusing to comply with a condition requiring drug testing, the court is required to revoke probation or supervised release and impose a sentence that includes a term of imprisonment. 18 U.S.C. §§ 3565(b), 3583(g).

6. In the case of a defendant who fails a drug test, the court shall consider whether the availability of appropriate substance abuse programs, or a defendant's current or past participation in such programs, warrants an exception from the requirement of mandatory revocation and imprisonment under 18 U.S.C. §§ 3565(b) and 3583(g). 18 U.S.C. §§ 3563(a), 3583(d).".

Reason for Amendment: Section 110505 of the Violent Crime Control and Law Enforcement Act of 1994 amends 18 U.S.C. § 3583(e)(3) by specifying that a defendant whose supervised release term is revoked may not be required to serve more than five years in prison if the offense that resulted in the term of supervised release is a Class A felony. The provision also amends section 3583(g) by eliminating the mandatory re-imprisonment period of at least one-third of the term of supervised release if the defendant possesses a controlled substance. Additionally, the provision requires the courts to revoke probation or supervised release and impose a sentence that includes a term of imprisonment if the defendant is found to be in possession of a firearm, or refuses to participate in drug testing. Finally, the provision expressly authorizes the court to order an additional, limited period of supervision following revocation of supervised release and re-imprisonment.

Section 20414 of the Violent Crime Control and Law Enforcement Act of 1994 makes mandatory a condition of probation requiring that the defendant refrain from any unlawful use of a controlled substance. 18 U.S.C. § 3563(a)(4). The section also establishes a condition that the defendant, with certain exceptions, submit to periodic drug tests. The existing mandatory condition of probation requiring the defendant not to possess a controlled substance remains

unchanged. 18 U.S.C. § 3563(a)(3). Similar requirements are made with respect to conditions of supervised release. 18 U.S.C. § 3583(d).

Section 110506 of the Violent Crime Control and Law Enforcement Act of 1994 mandates revocation of probation and imposition of a term of imprisonment if the defendant violates probation by possessing a controlled substance or a firearm, or by refusing to comply with drug testing. 18 U.S.C. § 3565(b). It does not require revocation in the case of use of a controlled substance (although use presumptively may establish possession). No minimum term of imprisonment is required other than a sentence that includes a "term of imprisonment" consistent with the sentencing guidelines and revocation policy statements. Similar requirements are set forth in 18 U.S.C. § 3583(g) with respect to conditions of supervised release.

Section 20414 permits "an exception in accordance with United States Sentencing Commission guidelines" from the mandatory revocation provisions of section 3565(b), "when considering any action against a defendant who fails a drug test administered in accordance with [section 3563(a)(4)]." The exception from the mandatory revocation provisions appears limited to a defendant who fails the test and does not appear to apply to a defendant who refuses to take the test.

This amendment conforms §§7B1.3 (Revocation of Probation or Supervised Release) and 7B1.4 (Term of Imprisonment) to these revised statutory provisions.

Effective Date: The effective date of this amendment is November 1, 1995.

534. Amendment: Appendix A (Statutory Index) is amended by inserting the following at the appropriate place by title and section:

"7 U.S.C. § 2018(c)	2N2.1",
"7 U.S.C. § 6810	2N2.1",
"18 U.S.C. § 36	2D1.1",
"18 U.S.C. § 37	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.4, 2A4.1, 2A5.1, 2A5.2, 2B1.3, 2B3.1, 2K1.4",
"18 U.S.C. § 113(a)(1)	2A2.1",
"18 U.S.C. § 113(a)(2)	2A2.2",
"18 U.S.C. § 113(a)(3)	2A2.2",
"18 U.S.C. § 113(a)(5) (Class A misdemeanor provisions only)	2A2.3",
"18 U.S.C. § 113(a)(6)	2A2.2",
"18 U.S.C. § 113(a)(7)	2A2.3",
"18 U.S.C. § 470	2B5.1, 2F1.1",
"18 U.S.C. § 668	2B1.1",
"18 U.S.C. § 844(m)	2K1.3",
"18 U.S.C. § 880	2B1.1",

"18 U.S.C. § 922(x)(1)	2K2.1",
"18 U.S.C. § 924(i)	2A1.1, 2A1.2",
"18 U.S.C. § 924(j)-(n)	2K2.1",
"18 U.S.C. § 1033	2B1.1, 2F1.1, 2J1.2",
"18 U.S.C. § 1118	2A1.1, 2A1.2",
"18 U.S.C. § 1119	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1",
"18 U.S.C. § 1120	2A1.1, 2A1.2, 2A1.3, 2A1.4",
"18 U.S.C. § 1121	2A1.1, 2A1.2",
"18 U.S.C. § 1204	2J1.2",
"18 U.S.C. § 1716D	2Q2.1",
"18 U.S.C. § 2258(a),(b)	2G2.1, 2G2.2",
"18 U.S.C. § 2261	2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.4, 2A4.1, 2B3.1, 2B3.2, 2K1.4",
"18 U.S.C. § 2262	2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.4, 2A4.1, 2B3.1, 2B3.2, 2K1.4",
"18 U.S.C. § 2280	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2B1.3 2B3.1, 2B3.2, 2K1.4",
"18 U.S.C. § 2281	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2B1.3, 2B3.1, 2B3.2, 2K1.4",
"18 U.S.C. § 2332a	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A1.5, 2A2.1, 2A2.2, 2B1.3, 2K1.4",
"18 U.S.C. § 2423(b)	2A3.1, 2A3.2, 2A3.3",
"21 U.S.C. § 843(a)(9)	2D3.1",
"21 U.S.C. § 843(c)	2D3.1",
"21 U.S.C. § 849	2D1.2",
"21 U.S.C. § 854	2S1.2",
"21 U.S.C. § 960(d)(3), (4)	2D1.11",
"21 U.S.C. § 960(d)(5)	2D1.13",
"21 U.S.C. § 960(d)(6)	2D3.1",
"42 U.S.C. § 1307(b)	2F1.1",
"49 U.S.C. § 46308	2A5.2",
"49 U.S.C. § 46312	2Q1.2",
"49 U.S.C. § 46502(a),(b)	2A5.1",
"49 U.S.C. § 46504	2A5.2",
"49 U.S.C. § 46505	2K1.5",
"49 U.S.C. § 46506	2A5.3".

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. § 113(a) by inserting "(for offenses committed prior to September 13, 1994)" immediately following "2A2.1";

in the line referenced to 18 U.S.C. § 113(b) by inserting "(for offenses committed prior to September 13, 1994)" immediately following "2A2.2";

in the line referenced to 18 U.S.C. § 113(c) by inserting "(for offenses committed prior to September 13, 1994)" immediately following "2A2.2";

in the line referenced to 18 U.S.C. § 113(f) by inserting "(for offenses committed prior to September 13, 1994)" immediately following "2A2.2";

in the line referenced to 18 U.S.C. § 242 by deleting "2H1.4" and inserting in lieu thereof "2H1.1";

in the line referenced to 18 U.S.C. § 245(b) by deleting "2H1.3" and inserting in lieu thereof "2H1.1";

in the line referenced to 18 U.S.C. § 246 by deleting "2H1.5" and inserting in lieu thereof "2H1.1";

in the line referenced to 18 U.S.C. § 247 by deleting "2H1.3" and inserting in lieu thereof "2H1.1";

in the line referenced to 18 U.S.C. § 371 by inserting "2K2.1 (if a conspiracy to violate 18 U.S.C. § 924(c))," immediately before "2X1.1";

in the line referenced to 18 U.S.C. § 922(r) by deleting "(r)" and inserting in lieu thereof "(r)-(w)";

in the line referenced to 18 U.S.C. § 1153 by inserting "2A2.3," immediately before "2A3.1";

in the line referenced to 18 U.S.C. § 2114 by deleting "2114" and inserting in lieu thereof "2114(a)";

in the line referenced to 18 U.S.C. § 2423 by deleting "2423" and by inserting in lieu thereof "2423(a)"; and

in the line referenced to 42 U.S.C. § 3631 by deleting "2H1.3" and inserting in lieu thereof "2H1.1".

Appendix A (Statutory Index) is amended by deleting:

"49 U.S.C. § 1472(c)	2A5.2
49 U.S.C. § 1472(h)(2)	2Q1.2
49 U.S.C. § 1472(i)(1)	2A5.1
49 U.S.C. § 1472(j)	2A5.2

49 U.S.C. § 1472(k)(1)	2A5.3
49 U.S.C. § 1472(l)	2K1.5
49 U.S.C. § 1472(n)(1)	2A5.1".

Chapter 1, Part A, Subpart 4(d) is amended in the second sentence of the third paragraph by deleting "six" and inserting in lieu thereof "eight"; and in the third sentence of the third paragraph by deleting "seven through" and inserting in lieu thereof "nine and".

The Commentary to §1B1.5 captioned "Application Notes" is amended in Note 1 by deleting "2H1.1(a)(2)" and inserting in lieu thereof "2H1.1(a)(1)".

The Commentary to §2A2.1 captioned "Statutory Provisions" is amended by deleting "113(a)" and inserting in lieu thereof "113(a)(1)".

The Commentary to §2A2.2 captioned "Statutory Provisions" is amended by deleting "113(b), (c), (f)" and inserting in lieu thereof "113(a)(2), (3), (6)".

The Commentary to §2A5.1 captioned "Statutory Provisions" is amended by deleting "49 U.S.C. § 1472 (i), (n)" and inserting in lieu thereof "49 U.S.C. § 46502 (a), (b) (formerly 49 U.S.C. § 1472 (i), (n))".

The Commentary to §2A5.1 captioned "Background" is amended by deleting "49 U.S.C. § 1472(i)" and inserting in lieu thereof "49 U.S.C. § 46502(a)", and by deleting "49 U.S.C. § 1472(n)" and inserting in lieu thereof "49 U.S.C. § 46502(b)".

The Commentary to §2A5.2 captioned "Statutory Provisions" is amended by deleting "49 U.S.C. § 1472(c), (j)" and inserting in lieu thereof "49 U.S.C. §§ 46308, 46504 (formerly 49 U.S.C. § 1472(c), (j))".

The Commentary to §2A5.2 captioned "Background" is amended by deleting "49 U.S.C. § 1472(l) and inserting in lieu thereof "49 U.S.C. § 46505".

The Commentary to §2A5.3 captioned "Statutory Provision" is amended by deleting "49 U.S.C. § 1472(k)(1)" and inserting in lieu thereof "49 U.S.C. § 46506 (formerly 49 U.S.C. § 1472(k)(1))".

The Commentary to §2A5.3 captioned "Application Notes" is amended in Note 1 by deleting "49 U.S.C. § 1472(k)(1)" and inserting in lieu thereof "49 U.S.C. § 46506".

The Commentary to 2C1.2 captioned "Background" is amended by deleting the third sentence as follows:

> "The maximum term of imprisonment authorized by statute for these offenses is two years.".

The Commentary to 2C1.3 captioned "Background" is amended by deleting the second sentence as follows:

"The maximum term of imprisonment authorized by statute is two years.".

Section 2D3.1 is amended in the title by deleting "Illegal Use of Registration Number to Manufacture, Distribute, Acquire, or Dispense a Controlled Substance" and inserting in lieu thereof "Regulatory Offenses Involving Registration Numbers; Unlawful Advertising Relating to Schedule I Substances".

The Commentary to §2D3.1 captioned "Background" is amended by deleting:

"Background: The maximum term of imprisonment authorized by statute is four years, except in a case with a prior drug-related felony where the maximum term of imprisonment authorized by statute is eight years.".

Section 2D3.2 is amended in the title by inserting "or Listed Chemicals" immediately after "Controlled Substances".

The Commentary to §2D3.2 captioned "Background" is amended by deleting:

"Background: These offenses are misdemeanors. The maximum term of imprisonment authorized by statute is one year.".

The Commentary to §2H2.1 captioned "Statutory Provisions" is amended by deleting "1973j" and inserting in lieu thereof "1973j(a), (b)".

The Commentary to §2K1.3 captioned "Statutory Provisions" is amended by deleting "5865" and inserting in lieu thereof "5685".

Section 2K1.5 (b)(3) is amended by deleting "49 U.S.C. § 1472(l)" and inserting in lieu thereof "49 U.S.C. § 46505".

The Commentary to §2K1.5 captioned "Statutory Provision" is amended by deleting "49 U.S.C. § 1472(l)" and inserting in lieu thereof "49 U.S.C. § 46505 (formerly 49 U.S.C. § 1472(l))".

The Commentary to §2K1.5 captioned "Background" is amended by deleting "49 U.S.C. § 1472(l)(2)" and inserting in lieu thereof "49 U.S.C. § 46505(c)".

Section 2Q2.1 is amended in the title by deleting "Specially Protected Fish, Wildlife, and Plants; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife, and Plants", and inserting in lieu thereof "Offenses Involving Fish, Wildlife, and Plants".

Section 3D1.2(d) is amended in the third paragraph by deleting the semicolon immediately following "2B2.3" and inserting in lieu thereof a comma; and by deleting "2H1.2, 2H1.3, 2H1.4,".

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in Illustration 3 by deleting "seventy-five" and inserting in lieu thereof "75"; by deleting "heroin equivalents" and inserting in lieu thereof "marihuana equivalents (using the Drug Equivalency Tables in the Commentary to §2D1.1)"; by deleting

"forty-six grams of heroin" and inserting in lieu thereof "46 kilograms of marihuana"; by deleting "thirty grams of heroin" and inserting in lieu thereof "30 kilograms of marihuana; and the third count translates into 75 kilograms of marihuana"; and by deleting "151 grams of heroin" and inserting in lieu thereof "151 kilograms of marihuana".

The Commentary to §8C2.4 captioned "Application Notes" is amended by deleting:

> "5. Special instructions regarding the determination of the base fine are contained in: §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery); §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; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations); §2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors); §2S1.1 (Laundering of Monetary Instruments); §2S1.2 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity); and §2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports).",

and inserting in lieu thereof:

> "5. Special instructions regarding the determination of the base fine are contained in §§2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery); 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; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations); 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors); 2S1.1 (Laundering of Monetary Instruments); and 2S1.2 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity).".

Reason for Amendment: This amendment makes Appendix A (Statutory Index) more comprehensive. References are added for new offenses enacted by the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796; the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, Pub. L. 103-190, 107 Stat. 2266; the Food Stamp Program Improvements Act of 1994, Pub. L. 103-225, 108 Stat. 106; the Social Security Independence and Program Improvements Act of 1994, Pub. L. 103-296 108 Stat. 1464; the Domestic Chemical Diversion Act of 1993, Pub. L. 103-200, 107 Stat. 2333; and the International Parental Kidnapping Crime Act of 1993, Pub. L. 103-173, 107 Stat. 1998. In addition, the amendment conforms Appendix A to other statutory revisions; revises the titles of §§2D3.1 (Regulatory Offenses Involving Registration Numbers; Unlawful Advertising Relating to Schedule I Substances; Attempt or Conspiracy), 2D3.2 (Regulatory Offenses Involving Controlled Substances or Listed Chemicals; Attempt or Conspiracy), and 2Q2.1

(Offenses Involving Fish, Wildlife, and Plants) to better reflect their scope; conforms Chapter One, Part A, Subpart (4)(d), §§1B1.5 (Interpretation of References to Other Offense Guidelines), 2A5.1 (Aircraft Piracy or Attempted Aircraft Piracy), 2A5.2 (Interference with Flight Crew Member or Flight Attendant), 2A5.3 (Committing Certain Crimes Aboard Aircraft), 2H2.1 (Obstructing an Election or Registration), 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), 2K1.5 (Possessing Dangerous Weapons or Materials While Boarding or Aboard an Aircraft), 3D1.2 (Groups of Closely Related Counts), the Illustrations of the Operation of the Multiple-Count Rules following §3D1.5 (Determining the Total Punishment), and §8C2.4 (Base Fine) to revisions made by guideline or statutory amendments; and deletes obsolete background commentary in §§2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), 2C1.3 (Conflict of Interest), 2D3.1, and 2D3.2.

Effective Date: The effective date of this amendment is November 1, 1995.

535. Amendment: Section 5G1.3 is amended by deleting:

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

and inserting in lieu thereof:

"(c) (Policy Statement) In any other case, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.".

The Commentary to §5G1.3 captioned "Application Notes" is amended in Note 1 by inserting "Consecutive sentence - subsection (a) cases." immediately before "Under"; and by deleting "where the instant offense (or any part thereof)" and inserting in lieu thereof "when the instant offense".

The Commentary to §5G1.3 captioned "Application Notes" is amended by deleting:

"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 30 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 45 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.

4. If the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense should be imposed to be served consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release (in accord with the policy expressed in §§7B1.3 and 7B1.4)",

and inserting in lieu thereof:

"2. Adjusted concurrent sentence - subsection (b) cases. When a sentence is imposed pursuant to subsection (b), the court should adjust the sentence for any period of imprisonment already served as a result of the conduct taken into account in determining the guideline range for the instant offense if the court determines that period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons. Example: The defendant is convicted of a federal offense charging the sale of 30 grams of cocaine. Under §1B1.3 (Relevant Conduct), the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence 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 45 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 as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on 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 guideline range because the defendant has been credited for guideline purposes under §5G1.3(b) with six months served in state custody that will not be credited to the federal sentence under 18 U.S.C. § 3585(b).

3. Concurrent or consecutive sentence - subsection (c) cases. In circumstances not covered under subsection (a) or (b), subsection (c) applies. Under this subsection, the court may impose a sentence concurrently, partially concurrently, or consecutively. To achieve a reasonable punishment and avoid unwarranted disparity, the court should consider the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a)) and be cognizant of:

(a) the type (e.g., determinate, indeterminate/parolable) and length of the

prior undischarged sentence;

(b) the time served on the undischarged sentence and the time likely to be served before release;

(c) the fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and

(d) any other circumstance relevant to the determination of an appropriate sentence for the instant offense.

4. Partially concurrent sentence. In some cases under subsection (c), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence (A) when the defendant is released from the prior undischarged sentence, or (B) on a specified date, whichever is earlier. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date.

5. Complex situations. Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (c) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.

6. Revocations. If the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense should be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release. See §7B1.3 (Revocation of Probation or Supervised Release) (setting forth a policy that any imprisonment penalty imposed for violating probation or supervised release should be consecutive to any sentence of imprisonment being served or subsequently imposed).".

The Commentary to §5G1.3 captioned "Background" is amended by deleting:

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

sentences been imposed at the same time.",

and inserting in lieu thereof:

"In a case in which a defendant is subject to an undischarged sentence of imprisonment, the court generally has authority to impose an imprisonment sentence on the current offense to run concurrently with or consecutively to the prior undischarged term. 18 U.S.C. § 3584(a). Exercise of that authority, however, is predicated on the court's consideration of the factors listed in 18 U.S.C. § 3553(a), including any applicable guidelines or policy statements issued by the Sentencing Commission.".

Reason for Amendment: This is a two-part amendment. First, this amendment clarifies the application of subsections (a) and (b) of this guideline. Second, in circumstances covered by the policy statement in subsection (c), this amendment affords the sentencing court additional flexibility to impose, as appropriate, a consecutive, concurrent, or partially concurrent sentence in order to achieve a reasonable punishment for the instant offense.

Authority to impose a partially concurrent sentence is found in the Sentencing Reform Act of 1984 (SRA). In enacting 28 U.S.C. § 994(l)(1), Congress contemplated that 18 U.S.C. § 3584 would allow imposition of partially concurrent sentences, in addition to fully concurrent or consecutive sentences. ("It is the Committee's intent that, to the extent feasible, the sentences for each of the multiple offenses be determined separately and the degree to which they should overlap be specified.") S. Rep. No. 225, 98th Cong., 1st Sess. 177 (1983). Without the ability to fashion such a sentence, the instruction to the Commission in 28 U.S.C. § 994(l)(1) to provide a reasonable incremental penalty for additional offenses could not be implemented successfully in certain situations, particularly when the defendant's release date on an undischarged term of imprisonment cannot be determined readily in advance (e.g., in the case of an indeterminate sentence subject to parole release).

Prior to the SRA, only the Bureau of Prisons had the authority to commence a federal sentence prior to the defendant's release from imprisonment on a state sentence. See, e.g., United States v. Segal, 549 F.2d 1293, 1301 (9th Cir. 1977). SRA legislative history pertaining to 18 U.S.C. § 3584 indicates that this new section was intended to authorize imposition of a federal prison sentence to run concurrently or consecutively to a state prison sentence. "This . . . [section 3584] changes the law that now applies to a person sentenced for a Federal offense who is already serving a term of imprisonment for a state offense." S. Rep. No. 225, supra at 127. "Thus, it is intended that this provision be construed contrary to the holding in United States v. Segal. . ." Id. (at 127 n.314). See United States v. Hardesty, 958 F.2d 910, 914 (stating that, under section 3584, "Congress has expressly granted federal judges the discretion to impose a sentence concurrent to a state prison term"), aff'd en banc, 977 F.2d 1347 (9th Cir. 1992).

Effective Date: The effective date of this amendment is November 1, 1995.

536. Amendment: Section 1B1.10(c) is amended by deleting "and 506" and inserting in lieu thereof "505, 506, and 516".

The Commentary to §1B1.10 captioned "Background" is amended in the fourth paragraph by inserting an asterisk immediately following "old guidelines"; and by inserting, as a note,

following the Background Commentary:

"*So in original. Probably should be 'to fall above the amended guidelines'.".

Reason for Amendment: This amendment expands the listing in §1B1.10(d) to implement the directive in 28 U.S.C. § 994(u) in respect to guideline amendments that may be considered for retroactive application. The amendment also makes an editorial addition to the Commentary to §1B1.10 (Retroactivity of Amended Guideline Range).

Effective Date: The effective date of this amendment is November 1, 1995.

537. Amendment: Section 2G2.1(a) is amended by deleting "25" and inserting in lieu thereof "27".

Section 2G2.1(b) is amended by deleting:

"(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.",

and inserting in lieu thereof:

"(1) If the offense involved a victim who had (A) not attained the age of twelve years, increase by 4 levels; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by 2 levels.".

Section 2G2.1(b) is amended by inserting after subdivision (2) the following additional subdivision:

"(3) If a computer was used to solicit participation by or with a minor in sexually explicit conduct for the purpose of producing sexually explicit material, increase by 2 levels.".

The Commentary to §2G2.1 captioned "Statutory Provisions" is amended by deleting "§ 2251(a), (b), (c)(1)(B)" and inserting in lieu thereof "§§ 2251(a), (b), (c)(1)(B), 2258(a), (b)".

Section 2G2.2(a) is amended by deleting "15" and inserting in lieu thereof "17".

Section 2G2.2(b) is amended by inserting after subdivision (4) the following additional subdivision:

"(5) If a computer was used for the transmission of the material or a notice or advertisement of the material, increase by 2 levels.".

The Commentary to §2G2.2 captioned "Statutory Provisions" is amended by inserting ", 2258(a), (b)" immediately before the period.

The Commentary to §2G2.2 captioned "Application Notes" is amended by deleting:

"1. 'Distribution,' as used in this guideline, includes any act related to distribution for pecuniary gain, including production, transportation, and possession with intent to distribute.

2. 'Sexually explicit conduct,' as used in this guideline, has the meaning set forth in 18 U.S.C. § 2256.",

and inserting in lieu thereof:

"1. For purposes of this guideline—

'Distribution' includes any act related to distribution for pecuniary gain, including production, transportation, and possession with intent to distribute.

'Pattern of activity involving the sexual abuse or exploitation of a minor' means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense, (B) involved the same or different victims, or (C) resulted in a conviction for such conduct.

'Sexual abuse or exploitation' means conduct constituting criminal sexual abuse of a minor, sexual exploitation of a minor, abusive sexual contact of a minor, any similar offense under state law, or an attempt or conspiracy to commit any of the above offenses. 'Sexual abuse or exploitation' does not include trafficking in material relating to the sexual abuse or exploitation of a minor.

'Sexually explicit conduct' has the meaning set forth in 18 U.S.C. § 2256.

2. If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(4) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(4) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.

Prior convictions taken into account under subsection (b)(4) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).".

The Commentary to §2G2.2 captioned "Application Notes" is amended in Note 3 by deleting "(c)(1)" and inserting in lieu thereof "subsection (c)(1)".

The Commentary to §2G2.2 captioned "Application Notes" is amended by deleting Notes 4 and 5 as follows:

"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.

5. If the defendant sexually exploited or abused a minor at any time, whether or not such sexual abuse occurred during the course of the offense, an upward departure may be 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, as well as whether the defendant has received an enhancement under subsection (b)(4) on account of such conduct.".

Section 2G2.4(a) is amended by deleting "13" and inserting in lieu thereof "15".

Section 2G2.4(b) is amended by inserting after subdivision (2) the following additional subdivision:

"(3) If the defendant's possession of the material resulted from the defendant's use of a computer, increase by 2 levels.".

Reason for Amendment: This is a four-part amendment. First, the amendment implements the congressional directives in section 2 of the Sex Crimes Against Children Prevention Act of 1995, Pub. L. 104-71, 109 Stat. 774, by providing a two-level enhancement above the currently prescribed offense level for offenses involving the sexual exploitation of minors. The two-level enhancement is provided in the base offense levels under §§2G2.1, 2G2.2, and 2G2.4.

Second, the amendment implements the congressional directive in section 3 of the above-noted Act by providing a two-level enhancement for offenses involving the sexual exploitation of a minor if a computer was used to transmit certain notices or advertisements of material involving minors engaged in sexually explicit conduct or to transport or ship that material. The enhancement in §2G2.2(b)(5) applies to the transmission of the material or of the notice or advertisement of the material. The enhancement in §2G2.4(b)(3) applies only if the defendant's possession of the material resulted from the defendant's use of a computer. In addition to these congressionally directed enhancements, the amendment adds a two-level enhancement under §2G2.1(b)(3) if a computer was used to solicit participation in sexually explicit conduct by or with a minor for the purpose of producing sexually explicit material.

Third, the amendment revises the Commentary to §2G2.2 to consolidate the definitions applicable to this guideline in the first application note and address several additional issues. The amendment revises the definition of "pattern of activity involving the sexual abuse or exploitation of a minor" to clarify that "sexual abuse or exploitation," for purposes of §2G2.2(b)(4), requires that the defendant personally had participated in such conduct. The amendment defines "sexual abuse or exploitation" to mean conduct constituting criminal sexual abuse, sexual exploitation, or abusive sexual contact and to exclude trafficking in child pornography. These revisions are consistent with United States v. Chapman, 60 F.3d 894 (1st Cir. 1995) and United States v. Ketcham, 80 F.3d 789 (3d Cir. 1996), both of which held that the defendant's transportation or distribution of child pornography is not sexual exploitation within the meaning of the "pattern of activity" enhancement in §2G2.2(b)(4). In addition, the amendment clarifies that the "pattern of activity" may include acts of sexual abuse or exploitation that were not committed during the course of the offense or that did not result in

a conviction. This revision responds in part to the holding in Chapman, 60 F.3d at 901, that the "pattern of activity" enhancement is inapplicable to past sexual abuse or exploitation unrelated to the offense of conviction. The amended language expressly provides that such conduct may be considered. Accordingly, the conduct considered for purposes of the "pattern of activity" enhancement is broader than the scope of relevant conduct typically considered under §1B1.3 (Relevant Conduct). In addition, the amendment provides that an upward departure may be warranted if the defendant (1) did not engage in a "pattern of activity" but nevertheless abused a minor at any time, or (2) engaged in a "pattern of activity" but the enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation. In addition, the amendment clarifies that prior convictions counted as part of the "pattern of activity" also may be counted as part of the defendant's criminal history under Chapter Four, if those convictions meet the criteria set forth in the relevant guidelines of that chapter.

Fourth, the amendment makes the "Statutory Provisions" in the Commentary to §§2G2.1 and 2G2.2 more comprehensive by adding 18 U.S.C. § 2258(a) and (b) to the list of statutory provisions covered by those guidelines.

Effective Date: The effective date of this amendment is November 1, 1996.

538. Amendment: Sections 2G1.1 and 2G1.2 are deleted in their entirety as follows:

"§2G1.1. Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct

(a) Base Offense Level: 14

(b) Specific Offense Characteristic

(1) If the offense involved the use of physical force, or coercion by threats or drugs or in any manner, increase by 4 levels.

(c) Special Instruction

(1) If the offense involved 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.

Commentary

Statutory Provisions: 8 U.S.C. § 1328; 18 U.S.C. §§ 2421, 2422.

Application Notes:

1. The base offense level assumes that the offense was committed for profit. In the infrequent case where the defendant did not commit the offense for profit and the offense did not involve physical force or coercion, the Commission recommends a downward departure of 8 levels.

2. The enhancement for physical force, or coercion, anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. See Chapter Five, Part K (Departures).

3. 'Coercion,' as used in this guideline, includes any form of conduct that negates the voluntariness of the behavior of the person transported. 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.

4. For the purposes of §3B1.1 (Aggravating Role), the persons transported are considered participants only if they assisted in the unlawful transportation of others.

5. For the purposes of Chapter Three, Part D (Multiple Counts), each person transported is to be treated as a separate 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.

§2G1.2. Transportation of a Minor for the Purpose of Prostitution or Prohibited Sexual Conduct

(a) Base Offense Level: 16

(b) Specific Offense Characteristics

(1) If the offense involved the use of physical force, or coercion by threats or drugs or in any manner, increase by 4 levels.

(2) If the offense involved the transportation of a minor under the age of twelve years, increase by 4 levels.

(3) If the offense involved the transportation of a minor at least twelve years of age but under the age of sixteen years, increase by 2 levels.

(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.

(c) Cross References

(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).

(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 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.

(d) Special Instruction

(1) If the offense involved 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.

Commentary

Statutory Provisions: 8 U.S.C. § 1328; 18 U.S.C. §§ 2421, 2422, 2423.

Application Notes:

1. For the purposes of Chapter Three, Part D (Multiple Counts), each person transported is to be treated as a separate 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 (d)(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.

2. The enhancement for physical force, or coercion, anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. See Chapter Five, Part K (Departures).

3. 'Coercion,' as used in this guideline, includes any form of conduct that negates the voluntariness of the behavior of the person transported. 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.

4. 'Sexually explicit conduct,' as used in this guideline, has the meaning set forth in 18 U.S.C. § 2256.

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).

7. The cross reference in subsection (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.".

A replacement guideline with accompanying commentary is inserted as §2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct).

Chapter 1, Part A, Subpart 4(b) is amended in the fourth paragraph by deleting:

"For example, the Commentary to §2G1.1 (Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct) recommends a downward departure of eight levels where a commercial purpose was not involved.".

Section 3D1.2(d) is amended in the third paragraph by deleting "2G1.2,".

Reason for Amendment: This is a three-part amendment. First, this amendment consolidates §§2G1.1 (Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct) and 2G1.2 (Transportation of a Minor for the Purpose of Prostitution or Prohibited Sexual Conduct) in furtherance of the Commission's goal of simplifying the operation of the guidelines. The enhancement pertaining to the age of the victim in subsection (b)(2) is increased by two levels to reflect the two-level higher base offense level of former §2G1.2. The consolidated offense guideline incorporates the cross references of §2G1.2, provides a definition of the term "victim," and clarifies that the guideline covers offenses under 18 U.S.C. § 2423(a), but not 18 U.S.C. § 2423(b) (a statutory provision referenced in Appendix A to §§2A3.1, 2A3.2, and 2A3.3).

Second, this amendment implements the congressional directive in section 4 of the Sex Crimes Against Children Prevention Act of 1995, Pub. L. 104-71, 109 Stat. 774, by providing a three-level increase in the enhancement for offenses involving the transportation of minors with intent to engage in prostitution or other prohibited sexual conduct. This three-level increase is provided in the specific offense characteristic pertaining to the age of the victim in subsection (b)(2) and is in addition to the two-level increase in this enhancement described in the first part

of this amendment.

Third, this amendment addresses 18 U.S.C. § 2422(b), a new offense created by section 508 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56. That offense makes it unlawful, in interstate or foreign commerce, including through the mail, or within the special maritime or territorial jurisdiction of the United States, to knowingly persuade, induce, entice, or coerce an individual under the age of 18 years to engage in prostitution or other prohibited sexual conduct. The amendment brings this new offense within the scope of the consolidated guideline. As revised, the guideline is broadly applicable to offenses that involve "promoting prostitution or prohibited sexual conduct." That term is defined to encompass conduct covered by the new Telecommunications Act offense as well as conduct previously covered by the guideline; i.e., transporting a person, or inducing a person to travel, for the purpose of prostitution or other prohibited sexual conduct.

Effective Date: The effective date of this amendment is November 1, 1996.

539. Amendment: Section 3A1.4 is amended in the title by deleting "International".

Section 3A1.4(a) is amended by deleting "international" and inserting in lieu thereof "a federal crime of".

The Commentary to §3A1.4 captioned "Application Notes" is amended in Note 1 in the first sentence by deleting "international" and inserting in lieu thereof "a federal crime of"; and in the second sentence by deleting "International" and inserting in lieu thereof "Federal crime of", and by deleting "2331" and inserting in lieu thereof "2332b(g)".

Reason for Amendment: This amendment implements section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1303. That section requires the Commission to amend the sentencing guidelines so that the adjustment in §3A1.4 (relating to international terrorism) applies more broadly to a "Federal crime of terrorism," as defined in 18 U.S.C. § 2332b(g), and provides that the Commission shall have the authority to promulgate this amendment as an emergency amendment under procedures set forth in section 21(a) of the Sentencing Act of 1987.

Effective Date: The effective date of this amendment is November 1, 1996.

540. Amendment: Appendix A (Statutory Index) is amended by inserting at the appropriate place by title and section:

"8 U.S.C. § 1255a(c)(6)	2L2.1, 2L2.2",
"16 U.S.C. § 1372	2Q2.1",
"16 U.S.C. § 1387	2Q2.1",
"18 U.S.C. § 474A	2B5.1, 2F1.1",
"18 U.S.C. § 842(l)-(o)	2K1.3",
"18 U.S.C. § 844(b)	2K1.1",
"18 U.S.C. § 844(g)	2K1.3",
"18 U.S.C. § 844(n)	2X1.1",
"18 U.S.C. § 844(o)	2K2.4",

"18 U.S.C. § 956	2A1.5, 2X1.1",
"18 U.S.C. § 1073	2J1.5, 2J1.6",
"18 U.S.C. § 2319A	2B5.3",
"21 U.S.C. § 843(a)(4)(A)	2D1.13",
"26 U.S.C. § 7212(b)	2B1.1, 2B2.1, 2B3.1",
"41 U.S.C. § 423(e)	2C1.1, 2C1.7, 2F1.1",
"49 U.S.C. § 11902	2B4.1",
"49 U.S.C. § 11903	2F1.1",
"49 U.S.C. § 14904	2B4.1",
"49 U.S.C. § 14103(b)	2B1.1",
"49 U.S.C. § 14905(b)	2B1.1",
"49 U.S.C. § 14909	2J1.1",
"49 U.S.C. § 14912	2F1.1",
"49 U.S.C. § 16102	2F1.1",
"49 U.S.C. § 16104	2J1.1".

Appendix A (Statutory Index) is amended in the line referenced to 8 U.S.C. § 1328, by deleting ", 2G1.2";

in the line referenced to 18 U.S.C. § 32(a),(b) by inserting ", 2X1.1" immediately following "2K1.4";

in the line referenced to 18 U.S.C. § 37 by inserting ", 2X1.1" immediately following "2K1.4";

in the line referenced to 18 U.S.C. § 115(a) by inserting ", 2X1.1" immediately following "2A6.1";

in the line referenced to 18 U.S.C. § 115(b)(2) by inserting ", 2X1.1" immediately following "2A4.1";

in the line referenced to 18 U.S.C. § 115 (b)(3) by inserting ", 2X1.1" immediately following "2A2.1";

in the line referenced to 18 U.S.C. § 491 by inserting "2B5.1," immediately before "2F1.1";

in the line referenced to 18 U.S.C. § 752 by inserting ", 2X3.1" immediately following "2P1.1";

in the line referenced to 18 U.S.C. § 1203 by inserting ", 2X1.1" immediately following "2A4.1";

in the line referenced to 18 U.S.C. § 2280 by inserting ", 2X1.1" immediately following "2K1.4";

in the line referenced to 18 U.S.C. § 2281 by inserting ", 2X1.1" immediately following "2K1.4";

in the line referenced to 18 U.S.C. § 2421, by deleting ", 2G1.2";

in the line referenced to 18 U.S.C. § 2422, by deleting ", 2G1.2";

in the line referenced to 18 U.S.C. § 2423(a), by deleting "2G1.2" and inserting in lieu thereof "2G1.1";

by deleting:

"42 U.S.C. § 7413	2Q1.2, 2Q1.3",

and inserting in lieu thereof:

"42 U.S.C. § 7413(c)(1)-(4)	2Q1.2, 2Q1.3
42 U.S.C. § 7413(c)(5)	2Q1.1";

in the line referenced to 49 U.S.C. § 11904 by deleting "2B4.1" and inserting in lieu thereof "2F1.1 (2B4.1 for offenses committed prior to January 1, 1996)";

in the line referenced to 49 U.S.C. § 11907(a) by inserting "(for offenses committed prior to January 1, 1996)" immediately following "2B4.1";

in the line referenced to 49 U.S.C. § 11907(b) by inserting "(for offenses committed prior to January 1, 1996)" immediately following "2B4.1"; and

in the line referenced to 49 U.S.C. § 46502(a),(b) by inserting ", 2X1.1" immediately following "2A5.1".

The Commentary to §3B1.4 captioned "Application Notes" is amended in Note 1 by deleting "processing" and inserting in lieu thereof "procuring".

The Commentary to §5C1.2 captioned "Application Notes" is amended in Note 6 in the second sentence by deleting "a ‘organizer," and inserting in lieu thereof "an ‘organizer,".

Reason for Amendment: This amendment makes Appendix A (Statutory Index) more comprehensive. References are added for additional offenses, including offenses enacted by the Marine Mammal Protection Act Amendments of 1994, Pub. L. 103-238, 108 Stat. 532; the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803; the National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106, 110 Stat. 186; and the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214. In addition, this amendment revises Appendix A to conform to the revision of existing statutes and reflect the consolidation of §§2G1.1 and 2G1.2. Finally, this amendment corrects clerical errors in §§3B1.4 and 5C1.2.

Effective Date: The effective date of this amendment is November 1, 1996.

541. Amendment: Section 2D1.11(d) is amended by deleting:

"(1) List I Chemicals 17.8 KG or more of Benzaldehyde;	Level 28

20 KG or more of Benzyl Cyanide;
20 KG or more of Ephedrine;
200 G or more of Ergonovine;
400 G or more of Ergotamine;
20 KG or more of Ethylamine;
44 KG or more of Hydriodic Acid;
320 KG or more of Isoafrole;
4 KG or more of Methylamine;
500 KG or more of N-Methylephedrine;
500 KG or more of N-Methylpseudoephedrine;
12.6 KG or more of Nitroethane;
200 KG or more of Norpseudoephedrine;
20 KG or more of Phenylacetic Acid;
200 KG or more of Phenylpropanolamine;
10 KG or more of Piperidine;
320 KG or more of Piperonal;
1.6 KG or more of Propionic Anhydride;
20 KG or more of Pseudoephedrine;
320 KG or more of Safrole;
400 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
11 KG or more of Acetic Anhydride;
1175 KG or more of Acetone;
20 KG or more of Benzyl Chloride;
1075 KG or more of Ethyl Ether;
1200 KG or more of Methyl Ethyl Ketone;
10 KG or more of Potassium Permanganate;
1300 KG or more of Toluene.

(2) List I Chemicals Level 26
At least 5.3 KG but less than 17.8 KG of Benzaldehyde;
At least 6 KG but less than 20 KG of Benzyl Cyanide;
At least 6 KG but less than 20 KG of Ephedrine;
At least 60 G but less than 200 G of Ergonovine;
At least 120 G but less than 400 G of Ergotamine;
At least 6 KG but less than 20 KG of Ethylamine;
At least 13.2 KG but less than 44 KG of Hydriodic Acid;
At least 96 KG but less than 320 KG of Isoafrole;
At least 1.2 KG but less than 4 KG of Methylamine;
At least 150 KG but less than 500 KG of N-Methylephedrine;
At least 150 KG but less than 500 KG of N-Methylpseudoephedrine;
At least 3.8 KG but less than 12.6 KG of Nitroethane;
At least 60 KG but less than 200 KG of Norpseudoephedrine;
At least 6 KG but less than 20 KG of Phenylacetic Acid;
At least 60 KG but less than 200 KG of Phenylpropanolamine;
At least 3 KG but less than 10 KG of Piperidine;
At least 96 KG but less than 320 KG of Piperonal;

At least 480 G but less than 1.6 KG of Propionic Anhydride;
At least 6 KG but less than 20 KG of Pseudoephedrine;
At least 96 KG but less than 320 KG of Safrole;
At least 120 KG but less than 400 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 3.3 KG but less than 11 KG of Acetic Anhydride;
At least 352.5 KG but less than 1175 KG of Acetone;
At least 6 KG but less than 20 KG of Benzyl Chloride;
At least 322.5 KG but less than 1075 KG of Ethyl Ether;
At least 360 KG but less than 1200 KG of Methyl Ethyl Ketone;
At least 3 KG but less than 10 KG of Potassium Permanganate;
At least 390 KG but less than 1300 KG of Toluene.

(3) List I Chemicals Level 24
At least 1.8 KG but less than 5.3 KG of Benzaldehyde;
At least 2 KG but less than 6 KG of Benzyl Cyanide;
At least 2 KG but less than 6 KG of Ephedrine;
At least 20 G but less than 60 G of Ergonovine;
At least 40 G but less than 120 G of Ergotamine;
At least 2 KG but less than 6 KG of Ethylamine;
At least 4.4 KG but less than 13.2 KG of Hydriodic Acid;
At least 32 KG but less than 96 KG of Isoafrole;
At least 400 G but less than 1.2 KG of Methylamine;
At least 50 KG but less than 150 KG of N-Methylephedrine;
At least 50 KG but less than 150 KG of N-Methylpseudoephedrine;
At least 1.3 KG but less than 3.8 KG of Nitroethane;
At least 20 KG but less than 60 KG of Norpseudoephedrine;
At least 2 KG but less than 6 KG of Phenylacetic Acid;
At least 20 KG but less than 60 KG of Phenylpropanolamine;
At least 1 KG but less than 3 KG of Piperidine;
At least 32 KG but less than 96 KG of Piperonal;
At least 160 G but less than 480 G of Propionic Anhydride;
At least 2 KG but less than 6 KG of Pseudoephedrine;
At least 32 KG but less than 96 KG of Safrole;
At least 40 KG but less than 120 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 1.1 KG but less than 3.3 KG of Acetic Anhydride;
At least 117.5 KG but less than 352.5 KG of Acetone;
At least 2 KG but less than 6 KG of Benzyl Chloride;
At least 107.5 KG but less than 322.5 KG of Ethyl Ether;
At least 120 KG but less than 360 KG of Methyl Ethyl Ketone;
At least 1 KG but less than 3 KG of Potassium Permanganate;
At least 130 KG but less than 390 KG of Toluene.

(4) List I Chemicals Level 22
At least 1.2 KG but less than 1.8 KG of Benzaldehyde;

At least 1.4 KG but less than 2 KG of Benzyl Cyanide;
At least 1.4 KG but less than 2 KG of Ephedrine;
At least 14 G but less than 20 G of Ergonovine;
At least 28 G but less than 40 G of Ergotamine;
At least 1.4 KG but less than 2 KG of Ethylamine;
At least 3.08 KG but less than 4.4 KG of Hydriodic Acid;
At least 22.4 KG but less than 32 KG of Isoafrole;
At least 280 G but less than 400 G of Methylamine;
At least 35 KG but less than 50 KG of N-Methylephedrine;
At least 35 KG but less than 50 KG of N-Methylpseudoephedrine;
At least 879 G but less than 1.3 KG of Nitroethane;
At least 14 KG but less than 20 KG of Norpseudoephedrine;
At least 1.4 KG but less than 2 KG of Phenylacetic Acid;
At least 14 KG but less than 20 KG of Phenylpropanolamine;
At least 700 G but less than 1 KG of Piperidine;
At least 22.4 KG but less than 32 KG of Piperonal;
At least 112 G but less than 160 G of Propionic Anhydride;
At least 1.4 KG but less than 2 KG of Pseudoephedrine;
At least 22.4 KG but less than 32 KG of Safrole;
At least 28 KG but less than 40 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 726 G but less than 1.1 KG of Acetic Anhydride;
At least 82.25 KG but less than 117.5 KG of Acetone;
At least 1.4 KG but less than 2 KG of Benzyl Chloride;
At least 75.25 KG but less than 107.5 KG of Ethyl Ether;
At least 84 KG but less than 120 KG of Methyl Ethyl Ketone;
At least 700 G but less than 1 KG of Potassium Permanganate;
At least 91 KG but less than 130 KG of Toluene.

(5) List I Chemicals Level 20
At least 712 G but less than 1.2 KG of Benzaldehyde;
At least 800 G but less than 1.4 KG of Benzyl Cyanide;
At least 800 G but less than 1.4 KG of Ephedrine;
At least 8 G but less than 14 G of Ergonovine;
At least 16 G but less than 28 G of Ergotamine;
At least 800 G but less than 1.4 KG of Ethylamine;
At least 1.76 KG but less than 3.08 KG of Hydriodic Acid;
At least 12.8 KG but less than 22.4 KG of Isoafrole;
At least 160 G but less than 280 G of Methylamine;
At least 20 KG but less than 35 KG of N-Methylephedrine;
At least 20 KG but less than 35 KG of N-Methylpseudoephedrine;
At least 503 G but less than 879 G of Nitroethane;
At least 8 KG but less than 14 KG of Norpseudoephedrine;
At least 800 G but less than 1.4 KG of Phenylacetic Acid;
At least 8 KG but less than 14 KG of Phenylpropanolamine;
At least 400 G but less than 700 G of Piperidine;
At least 12.8 KG but less than 22.4 KG of Piperonal;

At least 64 G but less than 112 G of Propionic Anhydride;
At least 800 G but less than 1.4 KG of Pseudoephedrine;
At least 12.8 KG but less than 22.4 KG of Safrole;
At least 16 KG but less than 28 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 440 G but less than 726 G of Acetic Anhydride;
At least 47 KG but less than 82.25 KG of Acetone;
At least 800 G but less than 1.4 KG of Benzyl Chloride;
At least 43 KG but less than 75.25 KG of Ethyl Ether;
At least 48 KG but less than 84 KG of Methyl Ethyl Ketone;
At least 400 G but less than 700 G of Potassium Permanganate;
At least 52 KG but less than 91 KG of Toluene.

(6) List I Chemicals Level 18
At least 178 G but less than 712 G of Benzaldehyde;
At least 200 G but less than 800 G of Benzyl Cyanide;
At least 200 G but less than 800 G of Ephedrine;
At least 2 G but less than 8 G of Ergonovine;
At least 4 G but less than 16 G of Ergotamine;
At least 200 G but less than 800 G of Ethylamine;
At least 440 G but less than 1.76 KG of Hydriodic Acid;
At least 3.2 KG but less than 12.8 KG of Isoafrole;
At least 40 G but less than 160 G of Methylamine;
At least 5 KG but less than 20 KG of N-Methylephedrine;
At least 5 KG but less than 20 KG of N-Methylpseudoephedrine;
At least 126 G but less than 503 G of Nitroethane;
At least 2 KG but less than 8 KG of Norpseudoephedrine;
At least 200 G but less than 800 G of Phenylacetic Acid;
At least 2 KG but less than 8 KG of Phenylpropanolamine;
At least 100 G but less than 400 G of Piperidine;
At least 3.2 KG but less than 12.8 KG of Piperonal;
At least 16 G but less than 64 G of Propionic Anhydride;
At least 200 G but less than 800 G of Pseudoephedrine;
At least 3.2 KG but less than 12.8 KG of Safrole;
At least 4 KG but less than 16 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 110 G but less than 440 G of Acetic Anhydride;
At least 11.75 KG but less than 47 KG of Acetone;
At least 200 G but less than 800 G of Benzyl Chloride;
At least 10.75 KG but less than 43 KG of Ethyl Ether;
At least 12 KG but less than 48 KG of Methyl Ethyl Ketone;
At least 100 G but less than 400 G of Potassium Permanganate;
At least 13 KG but less than 52 KG of Toluene.

(7) List I Chemicals Level 16
At least 142 G but less than 178 G of Benzaldehyde;

At least 160 G but less than 200 G of Benzyl Cyanide;
At least 160 G but less than 200 G of Ephedrine;
At least 1.6 G but less than 2 G of Ergonovine;
At least 3.2 G but less than 4 G of Ergotamine;
At least 160 G but less than 200 G of Ethylamine;
At least 352 G but less than 440 G of Hydriodic Acid;
At least 2.56 KG but less than 3.2 KG of Isoafrole;
At least 32 G but less than 40 G of Methylamine;
At least 4 KG but less than 5 KG of N-Methylephedrine;
At least 4 KG but less than 5 KG of N-Methylpseudoephedrine;
At least 100 G but less than 126 G of Nitroethane;
At least 1.6 KG but less than 2 KG of Norpseudoephedrine;
At least 160 G but less than 200 G of Phenylacetic Acid;
At least 1.6 KG but less than 2 KG of Phenylpropanolamine;
At least 80 G but less than 100 G of Piperidine;
At least 2.56 KG but less than 3.2 KG of Piperonal;
At least 12.8 G but less than 16 G of Propionic Anhydride;
At least 160 G but less than 200 G of Pseudoephedrine;
At least 2.56 KG but less than 3.2 KG of Safrole;
At least 3.2 KG but less than 4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 88 G but less than 110 G of Acetic Anhydride;
At least 9.4 KG but less than 11.75 KG of Acetone;
At least 160 G but less than 200 G of Benzyl Chloride;
At least 8.6 KG but less than 10.75 KG of Ethyl Ether;
At least 9.6 KG but less than 12 KG of Methyl Ethyl Ketone;
At least 80 G but less than 100 G of Potassium Permanganate;
At least 10.4 KG but less than 13 KG of Toluene.

(8) List I Chemicals Level 14
3.6 KG or more of Anthranilic Acid;
At least 107 G but less than 142 G of Benzaldehyde;
At least 120 G but less than 160 G of Benzyl Cyanide;
At least 120 G but less than 160 G of Ephedrine;
At least 1.2 G but less than 1.6 G of Ergonovine;
At least 2.4 G but less than 3.2 G of Ergotamine;
At least 120 G but less than 160 G of Ethylamine;
At least 264 G but less than 352 G of Hydriodic Acid;
At least 1.92 KG but less than 2.56 KG of Isoafrole;
At least 24 G but less than 32 G of Methylamine;
4.8 KG or more of N-Acetylanthranilic Acid;
At least 3 KG but less than 4 KG of N-Methylephedrine;
At least 3 KG but less than 4 KG of N-Methylpseudoephedrine;
At least 75 G but less than 100 G of Nitroethane;
At least 1.2 KG but less than 1.6 KG of Norpseudoephedrine;
At least 120 G but less than 160 G of Phenylacetic Acid;
At least 1.2 KG but less than 1.6 KG of Phenylpropanolamine;

At least 60 G but less than 80 G of Piperidine;
At least 1.92 KG but less than 2.56 KG of Piperonal;
At least 9.6 G but less than 12.8 G of Propionic Anhydride;
At least 120 G but less than 160 G of Pseudoephedrine;
At least 1.92 KG but less than 2.56 KG of Safrole;
At least 2.4 KG but less than 3.2 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 66 G but less than 88 G of Acetic Anhydride;
At least 7.05 KG but less than 9.4 KG of Acetone;
At least 120 G but less than 160 G of Benzyl Chloride;
At least 6.45 KG but less than 8.6 KG of Ethyl Ether;
At least 7.2 KG but less than 9.6 KG of Methyl Ethyl Ketone;
At least 60 G but less than 80 G of Potassium Permanganate;
At least 7.8 KG but less than 10.4 KG of Toluene.

(9) List I Chemicals Level 12
Less than 3.6 KG of Anthranilic Acid;
Less than 107 G of Benzaldehyde;
Less than 120 G of Benzyl Cyanide;
Less than 120 G of Ephedrine;
Less than 1.2 G of Ergonovine;
Less than 2.4 G of Ergotamine;
Less than 120 G of Ethylamine;
Less than 264 G of Hydriodic Acid;
Less than 1.92 KG of Isoafrole;
Less than 24 G of Methylamine;
Less than 4.8 KG of N-Acetylanthranilic Acid;
Less than 3 KG of N-Methylephedrine;
Less than 3 KG of N-Methylpseudoephedrine;
Less than 75 G of Nitroethane;
Less than 1.2 KG of Norpseudoephedrine;
Less than 120 G of Phenylacetic Acid;
Less than 1.2 KG of Phenylpropanolamine;
Less than 60 G of Piperidine;
Less than 1.92 KG of Piperonal;
Less than 9.6 G of Propionic Anhydride;
Less than 120 G of Pseudoephedrine;
Less than 1.92 KG of Safrole;
Less than 2.4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
Less than 66 G of Acetic Anhydride;
Less than 7.05 KG of Acetone;
Less than 120 G of Benzyl Chloride;
Less than 6.45 KG of Ethyl Ether;
Less than 7.2 KG of Methyl Ethyl Ketone;
Less than 60 G of Potassium Permanganate;

Less than 7.8 KG of Toluene.",

and inserting in lieu thereof:

"(1) List I Chemicals Level 30
17.8 KG or more of Benzaldehyde;
20 KG or more of Benzyl Cyanide;
20 KG or more of Ephedrine;
200 G or more of Ergonovine;
400 G or more of Ergotamine;
20 KG or more of Ethylamine;
44 KG or more of Hydriodic Acid;
320 KG or more of Isosafrole;
4 KG or more of Methylamine;
500 KG or more of N-Methylephedrine;
500 KG or more of N-Methylpseudoephedrine;
12.6 KG or more of Nitroethane;
200 KG or more of Norpseudoephedrine;
20 KG or more of Phenylacetic Acid;
200 KG or more of Phenylpropanolamine;
10 KG or more of Piperidine;
320 KG or more of Piperonal;
1.6 KG or more of Propionic Anhydride;
20 KG or more of Pseudoephedrine;
320 KG or more of Safrole;
400 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone;

(2) List I Chemicals Level 28
At least 5.3 KG but less than 17.8 KG of Benzaldehyde;
At least 6 KG but less than 20 KG of Benzyl Cyanide;
At least 6 KG but less than 20 KG of Ephedrine;
At least 60 G but less than 200 G of Ergonovine;
At least 120 G but less than 400 G of Ergotamine;
At least 6 KG but less than 20 KG of Ethylamine;
At least 13.2 KG but less than 44 KG of Hydriodic Acid;
At least 96 KG but less than 320 KG of Isosafrole;
At least 1.2 KG but less than 4 KG of Methylamine;
At least 150 KG but less than 500 KG of N-Methylephedrine;
At least 150 KG but less than 500 KG of N-Methylpseudoephedrine;
At least 3.8 KG but less than 12.6 KG of Nitroethane;
At least 60 KG but less than 200 KG of Norpseudoephedrine;
At least 6 KG but less than 20 KG of Phenylacetic Acid;
At least 60 KG but less than 200 KG of Phenylpropanolamine;
At least 3 KG but less than 10 KG of Piperidine;
At least 96 KG but less than 320 KG of Piperonal;
At least 480 G but less than 1.6 KG of Propionic Anhydride;
At least 6 KG but less than 20 KG of Pseudoephedrine;
At least 96 KG but less than 320 KG of Safrole;

At least 120 KG but less than 400 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
11 KG or more of Acetic Anhydride;
1175 KG or more of Acetone;
20 KG or more of Benzyl Chloride;
1075 KG or more of Ethyl Ether;
1200 KG or more of Methyl Ethyl Ketone;
10 KG or more of Potassium Permanganate;
1300 KG or more of Toluene.

(3) List I Chemicals Level 26
At least 1.8 KG but less than 5.3 KG of Benzaldehyde;
At least 2 KG but less than 6 KG of Benzyl Cyanide;
At least 2 KG but less than 6 KG of Ephedrine;
At least 20 G but less than 60 G of Ergonovine;
At least 40 G but less than 120 G of Ergotamine;
At least 2 KG but less than 6 KG of Ethylamine;
At least 4.4 KG but less than 13.2 KG of Hydriodic Acid;
At least 32 KG but less than 96 KG of Isosafrole;
At least 400 G but less than 1.2 KG of Methylamine;
At least 50 KG but less than 150 KG of N-Methylephedrine;
At least 50 KG but less than 150 KG of N-Methylpseudoephedrine;
At least 1.3 KG but less than 3.8 KG of Nitroethane;
At least 20 KG but less than 60 KG of Norpseudoephedrine;
At least 2 KG but less than 6 KG of Phenylacetic Acid;
At least 20 KG but less than 60 KG of Phenylpropanolamine;
At least 1 KG but less than 3 KG of Piperidine;
At least 32 KG but less than 96 KG of Piperonal;
At least 160 G but less than 480 G of Propionic Anhydride;
At least 2 KG but less than 6 KG of Pseudoephedrine;
At least 32 KG but less than 96 KG of Safrole;
At least 40 KG but less than 120 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 3.3 KG but less than 11 KG of Acetic Anhydride;
At least 352.5 KG but less than 1175 KG of Acetone;
At least 6 KG but less than 20 KG of Benzyl Chloride;
At least 322.5 KG but less than 1075 KG of Ethyl Ether;
At least 360 KG but less than 1200 KG of Methyl Ethyl Ketone;
At least 3 KG but less than 10 KG of Potassium Permanganate;
At least 390 KG but less than 1300 KG of Toluene.

(4) List I Chemicals Level 24
At least 1.2 KG but less than 1.8 KG of Benzaldehyde;
At least 1.4 KG but less than 2 KG of Benzyl Cyanide;
At least 1.4 KG but less than 2 KG of Ephedrine;
At least 14 G but less than 20 G of Ergonovine;

At least 28 G but less than 40 G of Ergotamine;
At least 1.4 KG but less than 2 KG of Ethylamine;
At least 3.08 KG but less than 4.4 KG of Hydriodic Acid;
At least 22.4 KG but less than 32 KG of Isosafrole;
At least 280 G but less than 400 G of Methylamine;
At least 35 KG but less than 50 KG of N-Methylephedrine;
At least 35 KG but less than 50 KG of N-Methylpseudoephedrine;
At least 879 G but less than 1.3 KG of Nitroethane;
At least 14 KG but less than 20 KG of Norpseudoephedrine;
At least 1.4 KG but less than 2 KG of Phenylacetic Acid;
At least 14 KG but less than 20 KG of Phenylpropanolamine;
At least 700 G but less than 1 KG of Piperidine;
At least 22.4 KG but less than 32 KG of Piperonal;
At least 112 G but less than 160 G of Propionic Anhydride;
At least 1.4 KG but less than 2 KG of Pseudoephedrine;
At least 22.4 KG but less than 32 KG of Safrole;
At least 28 KG but less than 40 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 1.1 KG but less than 3.3 KG of Acetic Anhydride;
At least 117.5 KG but less than 352.5 KG of Acetone;
At least 2 KG but less than 6 KG of Benzyl Chloride;
At least 107.5 KG but less than 322.5 KG of Ethyl Ether;
At least 120 KG but less than 360 KG of Methyl Ethyl Ketone;
At least 1 KG but less than 3 KG of Potassium Permanganate;
At least 130 KG but less than 390 KG of Toluene.

(5) List I Chemicals Level 22
At least 712 G but less than 1.2 KG of Benzaldehyde;
At least 800 G but less than 1.4 KG of Benzyl Cyanide;
At least 800 G but less than 1.4 KG of Ephedrine;
At least 8 G but less than 14 G of Ergonovine;
At least 16 G but less than 28 G of Ergotamine;
At least 800 G but less than 1.4 KG of Ethylamine;
At least 1.76 KG but less than 3.08 KG of Hydriodic Acid;
At least 12.8 KG but less than 22.4 KG of Isosafrole;
At least 160 G but less than 280 G of Methylamine;
At least 20 KG but less than 35 KG of N-Methylephedrine;
At least 20 KG but less than 35 KG of N-Methylpseudoephedrine;
At least 503 G but less than 879 G of Nitroethane;
At least 8 KG but less than 14 KG of Norpseudoephedrine;
At least 800 G but less than 1.4 KG of Phenylacetic Acid;
At least 8 KG but less than 14 KG of Phenylpropanolamine;
At least 400 G but less than 700 G of Piperidine;
At least 12.8 KG but less than 22.4 KG of Piperonal;
At least 64 G but less than 112 G of Propionic Anhydride;
At least 800 G but less than 1.4 KG of Pseudoephedrine;
At least 12.8 KG but less than 22.4 KG of Safrole;

At least 16 KG but less than 28 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 726 G but less than 1.1 KG of Acetic Anhydride;
At least 82.25 KG but less than 117.5 KG of Acetone;
At least 1.4 KG but less than 2 KG of Benzyl Chloride;
At least 75.25 KG but less than 107.5 KG of Ethyl Ether;
At least 84 KG but less than 120 KG of Methyl Ethyl Ketone;
At least 700 G but less than 1 KG of Potassium Permanganate;
At least 91 KG but less than 130 KG of Toluene.

(6) List I Chemicals Level 20
At least 178 G but less than 712 G of Benzaldehyde;
At least 200 G but less than 800 G of Benzyl Cyanide;
At least 200 G but less than 800 G of Ephedrine;
At least 2 G but less than 8 G of Ergonovine;
At least 4 G but less than 16 G of Ergotamine;
At least 200 G but less than 800 G of Ethylamine;
At least 440 G but less than 1.76 KG of Hydriodic Acid;
At least 3.2 KG but less than 12.8 KG of Isosafrole;
At least 40 G but less than 160 G of Methylamine;
At least 5 KG but less than 20 KG of N-Methylephedrine;
At least 5 KG but less than 20 KG of N-Methylpseudoephedrine;
At least 126 G but less than 503 G of Nitroethane;
At least 2 KG but less than 8 KG of Norpseudoephedrine;
At least 200 G but less than 800 G of Phenylacetic Acid;
At least 2 KG but less than 8 KG of Phenylpropanolamine;
At least 100 G but less than 400 G of Piperidine;
At least 3.2 KG but less than 12.8 KG of Piperonal;
At least 16 G but less than 64 G of Propionic Anhydride;
At least 200 G but less than 800 G of Pseudoephedrine;
At least 3.2 KG but less than 12.8 KG of Safrole;
At least 4 KG but less than 16 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 440 G but less than 726 G of Acetic Anhydride;
At least 47 KG but less than 82.25 KG of Acetone;
At least 800 G but less than 1.4 KG of Benzyl Chloride;
At least 43 KG but less than 75.25 KG of Ethyl Ether;
At least 48 KG but less than 84 KG of Methyl Ethyl Ketone;
At least 400 G but less than 700 G of Potassium Permanganate;
At least 52 KG but less than 91 KG of Toluene.

(7) List I Chemicals Level 18
At least 142 G but less than 178 G of Benzaldehyde;
At least 160 G but less than 200 G of Benzyl Cyanide;
At least 160 G but less than 200 G of Ephedrine;
At least 1.6 G but less than 2 G of Ergonovine;

At least 3.2 G but less than 4 G of Ergotamine;
At least 160 G but less than 200 G of Ethylamine;
At least 352 G but less than 440 G of Hydriodic Acid;
At least 2.56 KG but less than 3.2 KG of Isosafrole;
At least 32 G but less than 40 G of Methylamine;
At least 4 KG but less than 5 KG of N-Methylephedrine;
At least 4 KG but less than 5 KG of N-Methylpseudoephedrine;
At least 100 G but less than 126 G of Nitroethane;
At least 1.6 KG but less than 2 KG of Norpseudoephedrine;
At least 160 G but less than 200 G of Phenylacetic Acid;
At least 1.6 KG but less than 2 KG of Phenylpropanolamine;
At least 80 G but less than 100 G of Piperidine;
At least 2.56 KG but less than 3.2 KG of Piperonal;
At least 12.8 G but less than 16 G of Propionic Anhydride;
At least 160 G but less than 200 G of Pseudoephedrine;
At least 2.56 KG but less than 3.2 KG of Safrole;
At least 3.2 KG but less than 4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 110 G but less than 440 G of Acetic Anhydride;
At least 11.75 KG but less than 47 KG of Acetone;
At least 200 G but less than 800 G of Benzyl Chloride;
At least 10.75 KG but less than 43 KG of Ethyl Ether;
At least 12 KG but less than 48 KG of Methyl Ethyl Ketone;
At least 100 G but less than 400 G of Potassium Permanganate;
At least 13 KG but less than 52 KG of Toluene.

(8) List I Chemicals Level 16
3.6 KG or more of Anthranilic Acid;
At least 107 G but less than 142 G of Benzaldehyde;
At least 120 G but less than 160 G of Benzyl Cyanide;
At least 120 G but less than 160 G of Ephedrine;
At least 1.2 G but less than 1.6 G of Ergonovine;
At least 2.4 G but less than 3.2 G of Ergotamine;
At least 120 G but less than 160 G of Ethylamine;
At least 264 G but less than 352 G of Hydriodic Acid;
At least 1.92 KG but less than 2.56 KG of Isosafrole;
At least 24 G but less than 32 G of Methylamine;
4.8 KG or more of N-Acetylanthranilic Acid;
At least 3 KG but less than 4 KG of N-Methylephedrine;
At least 3 KG but less than 4 KG of N-Methylpseudoephedrine;
At least 75 G but less than 100 G of Nitroethane;
At least 1.2 KG but less than 1.6 KG of Norpseudoephedrine;
At least 120 G but less than 160 G of Phenylacetic Acid;
At least 1.2 KG but less than 1.6 KG of Phenylpropanolamine;
At least 60 G but less than 80 G of Piperidine;
At least 1.92 KG but less than 2.56 KG of Piperonal;
At least 9.6 G but less than 12.8 G of Propionic Anhydride;

At least 120 G but less than 160 G of Pseudoephedrine;
At least 1.92 KG but less than 2.56 KG of Safrole;
At least 2.4 KG but less than 3.2 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 88 G but less than 110 G of Acetic Anhydride;
At least 9.4 KG but less than 11.75 KG of Acetone;
At least 160 G but less than 200 G of Benzyl Chloride;
At least 8.6 KG but less than 10.75 KG of Ethyl Ether;
At least 9.6 KG but less than 12 KG of Methyl Ethyl Ketone;
At least 80 G but less than 100 G of Potassium Permanganate;
At least 10.4 KG but less than 13 KG of Toluene.

(9) List I Chemicals Level 14
At least 2.7 KG but less than 3.6 KG of Anthranilic Acid;
At least 71.2 G but less than 107 G of Benzaldehyde;
At least 80 G but less than 120 G of Benzyl Cyanide;
At least 80 G but less than 120 G of Ephedrine;
At least 800 MG but less than 1.2 G of Ergonovine;
At least 1.6 G but less than 2.4 G of Ergotamine;
At least 80 G but less than 120 G of Ethylamine;
At least 176 G but less than 264 G of Hydriodic Acid;
At least 1.44 G but less than 1.92 KG of Isosafrole;
At least 16 G but less than 24 G of Methylamine;
At least 3.6 KG but less than 4.8 KG of N-Acetylanthranilic Acid;
At least 2.25 KG but less than 3 KG of N-Methylephedrine;
At least 2.25 KG but less than 3 KG of N-Methylpseudoephedrine;
At least 56.25 G but less than 75 G of Nitroethane;
At least 800 G but less than 1.2 KG of Norpseudoephedrine;
At least 80 G but less than 120 G of Phenylacetic Acid;
At least 800 G but less than 1.2 KG of Phenylpropanolamine;
At least 40 G but less than 60 G of Piperidine;
At least 1.44 KG but less than 1.92 KG of Piperonal;
At least 7.2 G but less than 9.6 G of Propionic Anhydride;
At least 80 G but less than 120 G of Pseudoephedrine;
At least 1.44 G but less than 1.92 KG of Safrole;
At least 1.8 KG but less than 2.4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 66 G but less than 88 G of Acetic Anhydride;
At least 7.05 KG but less than 9.4 KG of Acetone;
At least 120 G but less than 160 G of Benzyl Chloride;
At least 6.45 KG but less than 8.6 KG of Ethyl Ether;
At least 7.2 KG but less than 9.6 KG of Methyl Ethyl Ketone;
At least 60 G but less than 80 G of Potassium Permanganate;
At least 7.8 KG but less than 10.4 KG of Toluene.

(10) List I Chemicals Level 12
Less than 2.7 KG of Anthranilic Acid;
Less than 71.2 G of Benzaldehyde;
Less than 80 G of Benzyl Cyanide;
Less than 80 G of Ephedrine;
Less than 800 MG of Ergonovine;
Less than 1.6 G of Ergotamine;
Less than 80 G of Ethylamine;
Less than 176 G of Hydriodic Acid;
Less than 1.44 G of Isosafrole;
Less than 16 G of Methylamine;
Less than 3.6 KG of N-Acetylanthranilic Acid;
Less than 2.25 KG of N-Methylephedrine;
Less than 2.25 KG of N-Methylpseudoephedrine;
Less than 56.25 G of Nitroethane;
Less than 800 G of Norpseudoephedrine;
Less than 80 G of Phenylacetic Acid;
Less than 800 G of Phenylpropanolamine;
Less than 40 G of Piperidine;
Less than 1.44 KG of Piperonal;
Less than 7.2 G of Propionic Anhydride;
Less than 80 G of Pseudoephedrine;
Less than 1.44 G of Safrole;
Less than 1.8 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
Less than 66 G of Acetic Anhydride;
Less than 7.05 KG of Acetone;
Less than 120 G of Benzyl Chloride;
Less than 6.45 KG of Ethyl Ether;
Less than 7.2 KG of Methyl Ethyl Ketone;
Less than 60 G of Potassium Permanganate;
Less than 7.8 KG of Toluene.".

Section 2D1.11(d) is amended in Note E (List I Chemical Equivalency Table) by deleting "Isoafrole" and inserting in lieu thereof "Isosafrole".

The Commentary to §2D1.11 captioned "Application Notes" is amended in Note 4(a) in the first sentence by deleting "three kilograms" and inserting in lieu thereof "300 grams"; in the fourth sentence by deleting "24" and inserting in lieu thereof "26" and by deleting "14" and inserting in lieu thereof "16"; and in the fifth sentence by deleting "24" and inserting in lieu thereof "26".

Reason for Amendment: This amendment implements section 302 of the Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237, 110 Stat. 3099, which directs the Commission to increase by at least two levels the offense levels for offenses involving list I chemicals under 21 U.S.C. §§ 841(d)(1) and (2) and 960(d)(1) and (3).

Effective Date: The effective date of this amendment is May 1, 1997.

542. Amendment: Section 2H4.1(a) is amended by deleting "(Apply the greater):" and inserting in lieu thereof ": 22"; and by deleting subdivisions (1) and (2) as follows:

"(1) 15; or

(2) 2 plus the offense level applicable to any underlying offense.".

Section 2H4.1 is amended by inserting after subsection (a) the following additional subsection:

"(b) Specific Offense Characteristics

(1) (A) If any victim sustained permanent or life-threatening bodily injury, increase by 4 levels; or (B) if any victim sustained serious bodily injury, increase by 2 levels.

(2) If a dangerous weapon was used, increase by 2 levels.

(3) If any victim was held in a condition of peonage or involuntary servitude for (A) more than one year, increase by 3 levels; (B) between 180 days and one year, increase by 2 levels; or (C) more than 30 days but less than 180 days, increase by 1 level.

(4) If any other felony offense was committed during the commission of, or in connection with, the peonage or involuntary servitude offense, increase to the greater of:

(A) 2 plus the offense level as determined above, or

(B) 2 plus the offense level from the offense guideline applicable to that other offense, but in no event greater than level 43.".

The Commentary to §2H4.1 captioned "Statutory Provisions" is amended by inserting "241," before "1581".

The Commentary to §2H4.1 captioned "Application Note" is amended by deleting "Note" and inserting in lieu thereof "Notes"; by deleting:

"1. 'Offense level applicable to the underlying offense' is explained in the Commentary to §2H1.1.",

and inserting in lieu thereof:

"1. For purposes of this guideline—

'A dangerous weapon was used' means that a firearm was discharged, or that a firearm or dangerous weapon was otherwise used.

Definitions of 'firearm,' 'dangerous weapon,' 'otherwise used,' 'serious bodily injury,' and 'permanent or life-threatening bodily injury' are found in the Commentary to §1B1.1 (Application Instructions).";

and by inserting after Note 1the following additional notes:

"2. Under subsection (b)(4), 'any other felony offense' means any conduct that constitutes a felony offense under federal, state, or local law (other than an offense that is itself covered by this subpart). When 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. See Application Note 3 of §1B1.5 (Interpretation of References to other Offense Guidelines).

3. If the offense involved the holding of more than ten victims in a condition of peonage or involuntary servitude, an upward departure may be warranted.".

The Commentary to §2H4.1 captioned "Background" is deleted as follows:

"Background: This section covers statutes that prohibit peonage, involuntary servitude, and slave trade. For purposes of deterrence and just punishment, the minimum base offense level is 15. However, these offenses frequently involve other serious offenses. In such cases, the offense level will be increased under §2H4.1(a)(2).".

Reason for Amendment: This amendment implements section 218 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-573, which directs the Commission to review the guideline for peonage, involuntary servitude and slave trade offenses and amend the guideline pursuant to that review.

Effective Date: The effective date of this amendment is May 1, 1997.

543. Amendment: Section 2L1.1(a)(1) is amended by deleting "20" and inserting in lieu thereof "23".

Section 2L1.1(a)(2) is amended by deleting "9" and inserting in lieu thereof "12".

Section 2L1.1(b) is amended by deleting:

"(1) If the defendant committed the offense other than for profit, and the base offense level is determined under subsection (a)(2), decrease by 3 levels.",

and inserting in lieu thereof:

"(1) If (A) the defendant committed the offense other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child (or both the defendant's spouse and child), and (B) the base offense level is determined under subsection (a)(2), decrease by 3 levels.".

Section 2L1.1(b)(2) is amended in the column captioned "Increase in Level" by deleting "2"

in subdivision (A), and inserting in lieu thereof "3"; by deleting "4" in subdivision (B) and inserting in lieu thereof "6"; and by deleting in "6" subdivision (C) and inserting in lieu thereof "9".

Section 2L1.1(b) is amended by deleting:

"(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.",

and by inserting in lieu thereof:

"(3) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by 2 levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by 4 levels.".

Section 2L1.1(b) is amended by inserting after subdivision (3) the following additional subdivisions:

"(4) (Apply the greatest):

(A) If a firearm was discharged, increase by 6 levels, but if the resulting offense level is less than level 22, increase to level 22.

(B) If a dangerous weapon (including a firearm) was brandished or otherwise used, increase by 4 levels, but if the resulting offense level is less than level 20, increase to level 20.

(C) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels, but if the resulting offense level is less than level 18, increase to level 18.

(5) If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, increase by 2 levels, but if the resulting offense level is less than level 18, increase to level 18.

(6) If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury:

Death or Degree of Injury		Increase in Level
(1)	Bodily Injury	add 2 levels
(2)	Serious Bodily Injury	add 4 levels
(3)	Permanent or Life-Threatening Bodily Injury	add 6 levels
(4)	Death	add 8 levels.".

Section 2L1.1 is amended by inserting after subsection (b) the following additional subsection:

"(c) Cross Reference

If any person was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the special maritime and territorial jurisdiction of the United States, apply the appropriate murder guideline from Chapter Two, Part A, Subpart 1.".

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 1 by inserting at the beginning "For purposes of this guideline—";

by deleting:

"'For profit' means for financial gain or commercial advantage, but this definition does not include a defendant who commits the offense solely in return for his own entry or transportation.",

and inserting in lieu thereof:

"'The defendant committed the offense other than for profit' means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens."; and

by inserting at the end the following paragraphs:

"'Aggravated felony' is defined in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States).

'Child' has the meaning set forth in section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. § 1101(b)(1)).

'Spouse' has the meaning set forth in 101(a)(35) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(35)).

'Immigration and naturalization offense' means any offense covered by Chapter Two, Part L.".

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

"3. For the purposes of §3B1.2 (Mitigating Role), a defendant who commits the offense solely in return for his own entry or transportation is not entitled to a reduction for a minor or minimal role. This is because the reduction at §2L1.1(b)(1) applies to such a defendant.";

and by redesignating Note 4 as Note 3.

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 5 by deleting

"dangerous or inhumane treatment, death or bodily injury, possession of a dangerous weapon, or" following "involved"; and by redesignating Note 5 as Note 4.

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

"6. 'Aggravated felony' is defined in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States).".

The Commentary to §2L1.1 captioned "Application Notes" is amended by inserting after Note 4, as redesignated, the following additional notes:

"5. Prior felony conviction(s) resulting in an adjustment under subsection (b)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

6. Reckless conduct to which the adjustment from subsection (b)(5) applies includes a wide variety of conduct (e.g., transporting persons in the trunk or engine compartment of a motor vehicle, carrying substantially more passengers than the rated capacity of a motor vehicle or vessel, or harboring persons in a crowded, dangerous, or inhumane condition). If subsection (b)(5) applies solely on the basis of conduct related to fleeing from a law enforcement officer, do not apply an adjustment from §3C1.2 (Reckless Endangerment During Flight). Additionally, do not apply the adjustment in subsection (b)(5) if the only reckless conduct that created a substantial risk of death or serious bodily injury is conduct for which the defendant received an enhancement under subsection (b)(4).".

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

"A specific offense characteristic provides a reduction if the defendant did not commit the offense for profit. The offense level increases with the number of unlawful aliens smuggled, transported, or harbored.".

The Commentary to §2L1.1 captioned "Background" is amended in the last sentence by inserting "smuggling, transporting, or harboring" immediately following "scale".

Reason for Amendment: This amendment implements section 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-566, which directs the Commission to amend the guidelines for offenses related to smuggling, transporting, or harboring illegal aliens.

Effective Date: The effective date of this amendment is May 1, 1997.

544. Amendment: Section 2L2.1(a) is amended by deleting "9" and inserting in lieu thereof "11".

Section 2L2.1(b) is amended by deleting:

"(1) If the defendant committed the offense other than for profit, decrease by 3 levels.",

and inserting in lieu thereof:

"(1) If the defendant committed the offense other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child (or both the defendant's spouse and child), decrease by 3 levels.".

Section 2L2.1(b)(2) is amended in the column captioned "Increase in Level" by deleting "2" in subdivision (A) and inserting in lieu thereof "3"; by deleting "4" in subdivision (B) and inserting in lieu thereof "6"; and by deleting "6" subdivision (C) and inserting in lieu thereof "9".

Section 2L2.1(b) is amended by inserting after subdivision (3) the following additional subdivision:

"(4) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by 2 levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by 4 levels.".

The Commentary to §2L2.1 captioned "Application Notes" is amended by deleting Note 1 as follows:

"1. 'For profit' means for financial gain or commercial advantage.",

and inserting in lieu thereof:

"1. For purposes of this guideline—

'The defendant committed the offense other than for profit' means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.

'Immigration and naturalization offense' means any offense covered by Chapter Two, Part L.

'Child' has the meaning set forth in section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. § 1101(b)(1)).

'Spouse' has the meaning set forth in section 101(a)(35) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(35)).".

The Commentary to §2L2.1 captioned "Application Notes" is amended by inserting after Note 3 the following additional notes:

"4. Prior felony conviction(s) resulting in an adjustment under subsection (b)(4) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

5. If the offense involved substantially more than 100 documents, an upward departure may be warranted.".

Section 2L2.2(a) is amended by deleting "6" and inserting in lieu thereof “8”.

Section 2L2.2(b) is amended by deleting "Characteristic" and inserting in lieu thereof "Characteristics"; and by inserting after subdivision (1) the following additional subdivision:

"(2) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by 2 levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by 4 levels.".

The Commentary to §2L2.2 captioned "Application Note" is amended by deleting "Note" and inserting in lieu thereof "Notes"; by redesignating Note 1 as Note 2; and by inserting the following as the new Note 1:

"1. For purposes of this guideline—

‘Immigration and naturalization offense’ means any offense covered by Chapter Two, Part L.".

The Commentary to §2L2.2 captioned "Application Notes" is amended by inserting after Note 2, as redesignated, the following additional note:

"3. Prior felony conviction(s) resulting in an adjustment under subsection (b)(2) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).".

Reason for Amendment: This amendment implements section 211 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-569, which directs the Commission to amend the guidelines for offenses related to the fraudulent use of government-issued documents.

Effective Date: The effective date of this amendment is May 1, 1997.

545. Amendment: The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1(b) by deleting:

"As used in the guidelines, the definition of this term is somewhat different than that used in various statutes.".

The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1(j) by inserting "protracted" before "impairment"; and by deleting "As used in the guidelines, the definition of this term is somewhat different than that used in various statutes." and inserting in lieu thereof "In addition, ‘serious bodily injury’ is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any

similar offense under state law.".

The Commentary to §2A3.1 captioned "Application Notes" is amended in Note 1 by inserting "For purposes of this guideline—" before "'Permanent"; and by inserting at the end the following:

> "However, for purposes of this guideline, 'serious bodily injury' means conduct other than criminal sexual abuse, which already is taken into account in the base offense level under subsection (a).
>
> 'The means set forth in 18 U.S.C. § 2241(a) or (b)' are: by using force against the victim; by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnaping; 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. 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 "Application Notes" is amended by deleting:

> "2. 'The means set forth in 18 U.S.C. § 2241(a) or (b)' are: by using force against the victim; by threatening or placing the victim in fear that any person will be 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. This provision would apply, for example, where any dangerous weapon was used, brandished, or displayed to intimidate the victim.";

and by redesignating Notes 3, 4, 5, 6, and 7, as Notes 2, 3, 4, 5, and 6, respectively.

The Commentary to §2A4.1 captioned "Application Notes" is amended in Note 1 by inserting "For purposes of this guideline—" before "Definitions"; and by inserting at the end the following:

> "However, for purposes of this guideline, 'serious bodily injury' means conduct other than criminal sexual abuse, which is taken into account in the specific offense characteristic under subsection (b)(5).".

Section 2B3.1(b)(1) is amended by deleting "(A)" following "If"; and by deleting "or (B) the offense involved carjacking," before "increase".

Section 2B3.1(b) is amended by redesignating subdivisions (5) and (6) as subdivisions (6) and (7), respectively; and by inserting after subdivision (4) the following new subdivision (5):

> "(5) If the offense involved carjacking, increase by 2 levels.".

Reason for Amendment: This amendment implements, in a broader form, section 2 of the Carjacking Correction Act of 1996, Pub.L. 104-217, 110 Stat. 3020. The Act amended 18 U.S.C. § 2119(2) to include aggravated sexual abuse under 18 U.S.C. § 2241 and sexual abuse under 18 U.S.C. § 2242 within the meaning of "serious bodily injury." In implementing this legislation, the Commission has elected to broaden the term "serious bodily injury," as used in a number of offense conduct guidelines, so that such injury will be deemed to have occurred in the case of a sexual assault. The amendment also makes a number of conforming changes in other guidelines. In addition, this amendment amends §2B3.1(b)(1) to provide cumulative enhancements if the offense involved both bank robbery and carjacking.

Effective Date: The effective date of this amendment is November 1, 1997.

546. Amendment: Section 1B1.1(b) is amended by inserting ", cross references, and special instructions" after "characteristics".

The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1(l) by inserting at the end the following:

> "The term 'instant' is used in connection with 'offense,' 'federal offense,' or 'offense of conviction,' as the case may be, to distinguish the violation for which the defendant is being sentenced from a prior or subsequent offense, or from an offense before another court (e.g., an offense before a state court involving the same underlying conduct).".

Section 4B1.1 is amended by deleting "of the instant offense" and inserting in lieu thereof "the defendant committed the instant offense of conviction".

Section 4B1.2(3) is amended by inserting "of conviction" before "subsequent".

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 2 in the second paragraph by inserting "of conviction" after "instant offense".

The Commentary to §8A1.2 captioned "Application Notes" is amended in Note 3(a) by inserting at the end the following:

> "The term 'instant' is used in connection with 'offense,' 'federal offense,' or 'offense of conviction,' as the case may be, to distinguish the violation for which the defendant is being sentenced from a prior or subsequent offense, or from an offense before another court (e.g., an offense before a state court involving the same underlying conduct).".

Reason for Amendment: This amendment has two primary purposes. First, it corrects a technical error in §1B1.1(b). Second, it explains the purpose of the term "instant" as that term is employed throughout the Guidelines Manual, as a modifier of the term "offense," "federal offense," or "offense of conviction." It also clarifies the usage of the term "instant offense of conviction" at several places in the Guidelines Manual.

Effective Date: The effective date of this amendment is November 1, 1997.

547. Amendment: Section §1B1.5(d) is amended by deleting "final offense level (i.e., the greater

offense level taking into account both the Chapter Two offense level and any applicable Chapter Three adjustments)" and inserting in lieu thereof "Chapter Two offense level, except as otherwise expressly provided".

The Commentary to §1B1.5 captioned "Application Notes" is amended in Note 1 by deleting "§" before "2D1.2(a)(1)"; and by deleting ", (2), and 2H1.1(a)(1)" and inserting in lieu thereof "and (2))".

The Commentary to §1B1.5 captioned "Application Notes" is amended in Note 2 in the second sentence by deleting "greater final"; by deleting "(i.e., the greater offense level"; and by deleting "both" and inserting in lieu thereof "only".

The Commentary to §1B1.5 captioned "Application Notes" is amended in Note 2 by deleting:

> "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.",

and inserting in lieu thereof:

> ", unless the offense guideline expressly provides for consideration of both the Chapter Two offense level and applicable Chapter Three adjustments. For situations in which a comparison involving both Chapters Two and Three is necessary, see the Commentary to §§2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe); 2C1.7 (Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials); 2E1.1 (Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations); and 2E1.2 (Interstate or Foreign Travel or Transportation in Aid of a Racketeering Enterprise).".

The Commentary to §2C1.1 captioned "Application Notes" is amended by inserting after Note 6 the following additional note:

> "7. For the purposes of determining whether to apply the cross references in this section, the 'resulting offense level' means the greater final offense level (i.e., the offense level determined by taking into account both the Chapter Two offense level and any applicable adjustments from Chapter Three, Parts A-D).".

The Commentary to §2C1.7 captioned "Application Notes" is amended by inserting after Note 5 the following additional note:

> "6. For the purposes of determining whether to apply the cross references in this section, the 'resulting offense level' means the greater final offense level (i.e., the offense level determined by taking into account both the Chapter Two offense level and any applicable adjustments from Chapter Three, Parts A-D).".

Reason for Amendment: This amendment simplifies the guidelines by restricting the cross-reference comparison to the Chapter Two offense levels, unless a different procedure is expressly specified. With respect to §§2C1.1, 2C1.7, 2E1.1, and 2E1.2, the amendment, and an express provision in each of these guidelines, provide a different procedure because these guidelines are the only four offense guidelines in which the inclusion of Chapter Three adjustments in the comparison is likely to make a difference.

Effective Date: The effective date of this amendment is November 1, 1997.

548. Amendment: Section 1B1.10 is amended in the title by deleting "Retroactivity" and inserting in lieu thereof "Reduction in Term of Imprisonment as a Result".

Section 1B1.10(b) is amended by deleting "sentence" in both instances and inserting in lieu thereof "the term of imprisonment"; and by inserting ", except that in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served" after "sentenced".

The Commentary to §1B1.10 captioned "Application Notes" is amended by inserting after Note 2 the following additional notes:

"3. Under subsection (b), the amended guideline range and the term of imprisonment already served by the defendant limit the extent to which an eligible defendant's sentence may be reduced under 18 U.S.C. § 3582(c)(2). When the original sentence represented a downward departure, a comparable reduction below the amended guideline range may be appropriate; however, in no case shall the term of imprisonment be reduced below time served. Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.

5. If the limitation in subsection (b) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range, the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range.".

The Commentary to §1B1.10 captioned "Background" is amended in the third paragraph by inserting "to determine an amended guideline range under subsection (b)" after "retroactively"; and by inserting before the fourth paragraph the following additional paragraph:

> "The listing of an amendment in subsection (c) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.".

Reason for Amendment: This amendment makes a number of substantive and clarifying changes in the policy statement relating to retroactive application of an amendment that reduces a guideline range. The amendment provides that, in exercising discretion to reduce the term of imprisonment of an incarcerated defendant, a court may not reduce the term of imprisonment below time served (or, put differently, grant a greater reduction in imprisonment than the imprisonment time remaining to be served). In those cases in which the combination of time already served and this limitation preclude a defendant from receiving the full reduction the court would be inclined to grant as a result of an amended guideline range, the amended commentary instructs that the court may weigh the equities of such a situation in connection with a separate motion for early termination of supervised release under 18 U.S.C. § 3583(e)(1). The amendment also makes clear that, contrary to the holding in United States v. Etherton, 101 F.3d 80 (9th Cir. 1996), a reduction in the term of imprisonment imposed upon revocation of supervised release is not authorized by the policy statement. Finally, the amendment makes a number of changes in the title and text of the policy statement to improve the precision of the language, adds commentary emphasizing court discretion in applying amendments that the Commission has listed for possible retroactive application, and adds background commentary more fully describing the legal consequences flowing from a Commission decision to list an amendment for possible retroactive application.

Effective Date: The effective date of this amendment is November 1, 1997.

549. Amendment: Section 2A2.2(b) is amended by inserting after subdivision (4) the following additional subdivision:

> "(5) If the offense involved the violation of a court protection order, increase by 2 levels.".

Chapter Two, Part A, Subpart 6 is amended in the title by inserting "or Harassing" after "Threatening"; and by inserting ", Stalking, and Domestic Violence" after "Communications".

Section 2A6.1 is amended in the title by inserting "or Harassing" after "Threatening".

Section 2A6.1 is amended by deleting subsection (a) as follows:

> "(a) Base Offense Level: 12",

and inserting in lieu thereof:

"(a) Base Offense Level:

(1) 12; or

(2) 6, if the defendant is convicted of an offense under 47 U.S.C. § 223(a)(1)(C), (D), or (E) that did not involve a threat to injure a person or property.".

Section 2A6.1(b) is amended by redesignating subdivision (2) as subdivision (4); and by inserting after subdivision (1) the following new subdivisions:

"(2) If the offense involved more than two threats, increase by 2 levels.

(3) If the offense involved the violation of a court protection order, increase by 2 levels.".

Section 2A6.1(b)(4), as redesignated, is amended by deleting "If specific offense characteristic §2A6.1(b)(1) does not apply, and" and inserting in lieu thereof "If (A) subsection (a)(2) and subdivisions (1), (2), and (3) do not apply, and (B)".

The Commentary to §2A6.1 captioned "Statutory Provisions" is amended by inserting "; 47 U.S.C. § 223(a)(1)(C)-(E)" after "879".

The Commentary to §2A6.1 captioned "Application Note" is amended by deleting "Note" and inserting in lieu thereof "Notes"; and by inserting after Note 1 the following additional note:

"2. In determining whether subsections (b)(1), (b)(2), and (b)(3) apply, the court shall consider both conduct that occurred prior to the offense and conduct that occurred during the offense; however, conduct that occurred prior to the offense must be substantially and directly connected to the offense, under the facts of the case taken as a whole. For example, if the defendant engaged in several acts of mailing threatening letters to the same victim over a period of years (including acts that occurred prior to the offense), then for purposes of determining whether subsections (b)(1), (b)(2), and (b)(3) apply, the court shall consider only those prior acts of threatening the victim that have a substantial and direct connection to the offense.

For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving making a threatening or harassing communication to the same victim are grouped together under §3D1.2 (Groups of Closely Related Counts). Multiple counts involving different victims are not to be grouped under §3D1.2.

If the conduct involved substantially more than two threatening

communications to the same victim or a prolonged period of making harassing communications to the same victim, an upward departure may be warranted.".

Chapter Two, Part A, Subpart 6 is amended by adding after §2A6.1 the following new guideline:

"§2A6.2. Stalking or Domestic Violence

(a) Base Offense Level: 14

(b) Specific Offense Characteristic

(1) If the offense involved one of the following aggravating factors: (A) the violation of a court protection order; (B) bodily injury; (C) possession, or threatened use, of a dangerous weapon; or (D) a pattern of activity involving stalking, threatening, harassing, or assaulting the same victim, increase by 2 levels. If the offense involved more than one of these aggravating factors, increase by 4 levels.

(c) Cross Reference

(1) If the offense involved conduct covered by another offense guideline from Chapter Two, Part A (Offenses Against the Person), apply that offense guideline, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2261-2262.

Application Notes:

1. For purposes of this guideline—

'Bodily injury' and 'dangerous weapon' are defined in the Commentary to §1B1.1 (Application Instructions).

'Pattern of activity involving stalking, threatening, harassing, or assaulting the same victim' means any combination of two or more separate instances of stalking, threatening, harassing, or assaulting the same victim, whether or not such conduct resulted in a conviction. For example, a single instance of stalking accompanied by a separate instance of threatening, harassing, or assaulting the same victim constitutes a pattern of activity for purposes of this guideline.

'Stalking' means traveling with the intent to injure or harass another person and, in the course of, or as a result of, such travel, placing the person in reasonable fear of death or serious bodily injury to the person or the person's immediate family. See 18 U.S.C. § 2261A. 'Immediate family' has the meaning set forth in 18 U.S.C. § 115(c)(2).

2. Subsection (b)(1) provides for a two-level or four-level enhancement based on the degree to which the offense involved aggravating factors listed in that subsection. If the offense involved aggravating factors more serious than the factors listed in subsection (b)(1), the cross reference in subsection (c) most likely will apply, if the resulting offense level is greater, because the more serious conduct will be covered by another offense guideline from Chapter Two, Part A. For example, §2A2.2 (Aggravated Assault) most likely would apply pursuant to subsection (c) if the offense involved assaultive conduct in which injury more serious than bodily injury occurred or if a dangerous weapon was used rather than merely possessed.

3. In determining whether subsection (b)(1)(D) applies, the court shall consider, under the totality of the circumstances, any conduct that occurred prior to or during the offense; however, conduct that occurred prior to the offense must be substantially and directly connected to the offense. For example, if a defendant engaged in several acts of stalking the same victim over a period of years (including acts that occurred prior to the offense), then for purposes of determining whether subsection (b)(1)(D) applies, the court shall look to the totality of the circumstances, considering only those prior acts of stalking the victim that have a substantial and direct connection to the offense.

   Prior convictions taken into account under subsection (b)(1)(D) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

4. For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving stalking, threatening, or harassing the same victim are grouped together (and with counts of other offenses involving the same victim that are covered by this guideline) under §3D1.2 (Groups of Closely Related Counts). For example, if the defendant is convicted of two counts of stalking the defendant's ex-spouse under 18 U.S.C. § 2261A and one count of interstate domestic violence involving an assault of the ex-spouse under 18 U.S.C. § 2261, the stalking counts would be grouped together with the interstate domestic violence count. This grouping procedure avoids unwarranted 'double counting' with the enhancement in subsection (b)(1)(D) (for multiple acts of stalking, threatening, harassing, or assaulting the same victim) and recognizes that the stalking and interstate domestic violence counts are sufficiently related to warrant grouping.

   Multiple counts that are cross referenced to another offense guideline pursuant to subsection (c) are to be grouped together if §3D1.2 would require grouping of those counts under that offense guideline. Similarly, multiple counts cross

referenced pursuant to subsection (c) are not to be grouped together if §3D1.2 would preclude grouping of the counts under that offense guideline. For example, if the defendant is convicted of multiple counts of threatening an ex-spouse in violation of a court protection order under 18 U.S.C. § 2262 and the counts are cross referenced to §2A6.1 (Threatening or Harassing Communications), the counts would group together because Application Note 2 of §2A6.1 specifically requires grouping. In contrast, if the defendant is convicted of multiple counts of assaulting the ex-spouse in violation of a court protection order under 18 U.S.C. § 2262 and the counts are cross referenced to §2A2.2 (Aggravated Assault), the counts probably would not group together inasmuch as §3D1.2(d) specifically precludes grouping of counts covered by §2A2.2 and no other provision of §3D1.2 would likely apply to require grouping.

Multiple counts involving different victims are not to be grouped under §3D1.2.

5. If the defendant received an enhancement under subsection (b)(1) but that enhancement does not adequately reflect the extent or seriousness of the conduct involved, an upward departure may be warranted. For example, an upward departure may be warranted if the defendant stalked the victim on many occasions over a prolonged period of time.".

Reason for Amendment: This is a five-part amendment. First, this amendment addresses the new offense of interstate stalking, 18 U.S.C. § 2261A, which was enacted as section 1069 of the National Defense Authorization Act for Fiscal Year 1997, Pub. L. 104–201, 110 Stat. 2422. That offense makes it unlawful to travel across a state line or within federal jurisdiction with the intent to injure or harass another person and, in the course of, or as a result of, such travel, to place that person in reasonable fear of death or serious bodily injury to that person or that person's immediate family.

The amendment adds a new guideline, §2A6.2 (Stalking or Domestic Violence), to cover the stalking offense. The new guideline provides for a base offense level of 14 and an enhancement for the presence of one or more aggravating factors that are often part of a stalking offense, including the violation of a court protection order and the presence of a pattern of stalking, harassing, threatening, or assaultive conduct. The new guideline also provides for a cross reference to other Chapter Two guidelines if the offense involved more serious conduct, such as aggravated assault or kidnapping, that would produce a greater offense level. In addition, the new guideline permits the consideration of prior stalking, harassing, threatening, or assaultive conduct if that conduct is directly and substantially related to the offense.

The new guideline also incorporates the definitions of "bodily injury" and "dangerous weapon" found in §1B1.1 (Application Instructions). The definition of bodily injury found in the guidelines differs from the definition of bodily injury in 18 U.S.C. § 2266 that is applicable to interstate stalking and interstate domestic violence offenses. The definition of "bodily injury" in 18 U.S.C. § 2266 explicitly includes sexual abuse, but the guideline definition of "bodily injury" does not. However, the Commission is fully aware that criminal sexual abuse often is part of a domestic violence offense under 18 U.S.C. §§ 2261 and 2262 and may be part of a stalking offense under 18 U.S.C. § 2261A. It is the view of the Commission that the new guideline provides an adequate mechanism for taking into account the occurrence of criminal

sexual abuse in any of these offenses. This is because the guideline definition of "serious bodily injury" in §1B1.1 deems serious bodily injury -- a more serious gradient of bodily injury -- to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law. Under the new guideline, any offense that involved criminal sexual abuse almost certainly will be subject to the cross reference to another offense guideline and to the rule deeming such conduct to be serious bodily injury (for purposes of applying a serious bodily injury enhancement in that other guideline to the offense). Therefore, in all likelihood, the sentence will be enhanced for the occurrence of criminal sexual abuse because the case will be cross referenced to another guideline that enhances for serious bodily injury.

Second, the amendment changes the manner in which the offenses of interstate domestic violence, 18 U.S.C. § 2261, and interstate violation of a protection order, 18 U.S.C. § 2262, are treated under the guidelines. Instead of being referenced to the guidelines that may cover underlying conduct, the amendment brings those offenses under the ambit of the new guideline, §2A6.2. This change recognizes that the aggravating factors accounted for in the new guideline often are present in these offenses as well.

Third, the amendment adds an enhancement to §2A2.2 (Aggravated Assault), if the offense involved the violation of a court protection order, to ensure an appropriately severe offense level for stalking, domestic violence, and other cases that are sentenced under the aggravated assault guideline and involve this factor.

Fourth, the amendment addresses several new harassing telecommunications offenses, 47 U.S.C. § 223(a)(1)(C)-(E), which were enacted in section 502 of the Telecommunications Act of 1996, Pub. L. 104–104, 110 Stat. 56. Those offenses make it unlawful to make a telephone call or utilize a telecommunications device, whether or not conversation or communication ensues, without disclosing one's identity and with the intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communication; make or cause the telephone of another to repeatedly or continuously ring, with the intent to harass any person at the called number; or make repeated telephone calls or repeatedly initiate conversation with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication.

The amendment incorporates these new offenses into §2A6.1 (Threatening Communications). Recognizing that these offenses carry only a two-year maximum term of imprisonment, the amendment provides an alternative offense level of 6 (as compared to 12), if the defendant is convicted of any of these offenses and there was no threat to injure a person or property. The amendment also adds enhancements if the offense involved more than two threats or the violation of a court protection order.

Fifth, this amendment addresses a circuit conflict regarding the enhancement in §2A6.1 that provides a 6-level increase if the offense involved any conduct evidencing an intent to carry out a threat. Specifically, the conflict is whether or not conduct which occurred prior to the making of the threat can evidence an intent to carry out the threat. Compare United States v. Hornick, 942 F.2d 105 (2d Cir. 1991) ("a person cannot take action that will constitute proof of his intent to carry out a threat until after the threat has been made") cert. denied, 502 U.S. 1061 (1992) with United States v. Taylor, 88 F.3d 938 (11th Cir. 1996) ("the essential inquiry for §2A6.1(b)(1) is whether the facts of the case, taken as a whole, establish a sufficiently direct

connection between the defendant's pre-threat conduct and his threat"); United States v. Sullivan, 75 F.3d 297 (7th Cir. 1996)(same); United States v. Gary, 18 F.3d 1123 (4th Cir.) (same), cert. denied 513 U.S. 844 (1994); United States v. Hines, 26 F.3d 1469 (9th Cir. 1994)(same).

The amendment essentially adopts the Eleventh Circuit's view by adding an application note to both §§2A6.1 and 2A6.2 to provide that conduct which occurred prior to the offense shall be considered in determining specified enhancements in those guidelines if the prior conduct is substantially and directly connected to the offense.

Effective Date: The effective date of this amendment is November 1, 1997.

550. Amendment: The Commentary to §2A2.4 captioned "Application Notes" is amended in Note 1 by inserting the following after "(Aggravated Assault).":

> "Conversely, the base offense level does not reflect the possibility that the defendant may create a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement official (although an offense under 18 U.S.C. § 758 for fleeing or evading a law enforcement checkpoint at high speed will often, but not always, involve the creation of that risk). If the defendant creates that risk and no higher guideline adjustment is applicable for the conduct creating the risk, apply §3C1.2 (Reckless Endangerment During Flight).".

Reason for Amendment: This amendment clarifies the interaction of this guideline with the enhancement under §3C1.2 (Reckless Endangerment During Flight), particularly when the defendant is convicted under 18 U.S.C. § 758 of fleeing an immigration checkpoint at high speed.

Effective Date: The effective date of this amendment is November 1, 1997.

551. Amendment: Section 2B1.1(b) is amended by inserting after subdivision (6) the following additional subdivision:

> "(7) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit any foreign government, foreign instrumentality, or foreign agent, increase by 2 levels.".

The Commentary to §2B1.1 captioned "Statutory Provisions" is amended by inserting "1831, 1832," before "2113(b)".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 1 by inserting after the first paragraph the following additional paragraphs:

> "'Trade secret' is defined in 18 U.S.C. § 1839(3).
>
> 'Foreign instrumentality' and 'foreign agent' are defined in 18 U.S.C. § 1839(1) and (2), respectively.".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 2 by inserting after the fourth paragraph the following additional paragraph:

"In an offense involving unlawfully accessing, or exceeding authorized access to, a 'protected computer' as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), 'loss' includes the reasonable cost to the victim of conducting a damage assessment, restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service.".

The Commentary to §2B1.1 captioned "Application Notes" is amended by inserting after Note 14 the following additional notes:

"15. In cases where the loss determined under subsection (b)(1) does not fully capture the harmfulness of the conduct, an upward departure may be warranted. For example, the theft of personal information or writings (e.g., medical records, educational records, a diary) may involve a substantial invasion of a privacy interest that would not be addressed by the monetary loss provisions of subsection (b)(1).

16. In cases involving theft of information from a 'protected computer', as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), an upward departure may be warranted where the defendant sought the stolen information to further a broader criminal purpose.".

Section 2B1.3 is amended by inserting after subsection (c) the following additional subsection:

"(d) Special Instruction

(1) If the defendant is convicted under 18 U.S.C. § 1030(a)(5), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.".

The Commentary to §2B1.3 captioned "Statutory Provisions" is amended by inserting "1030(a)(5)," before "1361,".

The Commentary to §2B1.3 captioned "Application Notes" is amended in Note 4 by inserting "or interference with a telecommunications network" after "line"; by inserting ", with attendant life-threatening delay in the delivery of emergency medical treatment or disruption of other important governmental or private services" after "hours"; by deleting "instances" and inserting in lieu thereof "cases"; by deleting "would" and inserting in lieu thereof "may"; and by inserting at the end the following:

"See §§5K2.2 (Physical Injury), 5K2.7 (Disruption of Governmental Function), and 5K2.14 (Public Welfare).".

The Commentary to §2B1.3 is amended by adding at the end the following:

"Background: Subsection (d) implements the instruction to the Commission in section

805(c) of Public Law 104-132.".

Section 2B2.3(b) is amended by inserting after subdivision (2) the following additional subdivision:

"(3) If the offense involved invasion of a protected computer resulting in a loss exceeding $2000, increase the offense level by the number of levels from the table in §2F1.1 corresponding to the loss.".

The Commentary to §2B2.3 captioned "Statutory Provision" is amended by deleting "Provision" and inserting in lieu thereof "Provisions"; and by inserting "18 U.S.C. § 1030(a)(3);" before "42 U.S.C.".

The Commentary to §2B2.3 captioned "Application Note" is amended in Note 1 by inserting "For purposes of this guideline—" before "'Firearm'"; and by inserting after the first paragraph the following additional paragraph:

"'Protected computer' means a computer described in 18 U.S.C. § 1030(e)(2)(A) or (B).".

The Commentary to §2B2.3 captioned "Application Note" is amended by deleting "Note" and inserting "Notes" and by inserting after Note 1 the following additional note:

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

The Commentary to §2B3.2 captioned "Statutory Provisions" is amended by inserting "1030(a)(7)," following "877,".

The Commentary to §2B3.2 captioned "Background" is amended by inserting at the end:

"This guideline also applies to offenses under 18 U.S.C. § 1030(a)(7) involving a threat to impair the operation of a 'protected computer.'".

Section 2F1.1 is amended by inserting after subsection (b) the following additional subsection:

"(c) Special Instruction

(1) If the defendant is convicted under 18 U.S.C. § 1030(a)(4), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.".

The Commentary to §2F1.1 captioned "Statutory Provisions" is amended by inserting "1030(a)(4)," before "1031,".

The Commentary to §2F1.1 captioned "Background" is amended by inserting at the end the following additional paragraph:

" Subsection (c) implements the instruction to the Commission in section 805(c) of Public Law 104-132.".

Reason for Amendment: This amendment makes a number of changes in the theft, property destruction, trespass, extortion, and fraud guidelines to more effectively punish computer-related offenses. The amendment also addresses new offenses under 18 U.S.C. § 1030(a)(7), prohibiting extortion by threats of damage to a non-public government computer or a computer of a financial institution; 18 U.S.C. § 1831, prohibiting "economic espionage"; and 18 U.S.C. § 1832, prohibiting theft of "trade secrets," as broadly defined at 18 U.S.C. § 1839. Offenses under 18 U.S.C. § 1030(a)(7) are referenced to §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage); offenses under 18 U.S.C. §§ 1031 and 1832 are referenced to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).

Special instructions have been added to §§2B1.3 and 2F1.1 to provide that the minimum guideline sentence for those convicted under 18 U.S.C. § 1030(a)(4) and (5) is six months' imprisonment. These provisions implement a directive to the Commission in section 805(c) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, 110 Stat. 1305.

Effective Date: The effective date of this amendment is November 1, 1997.

552. Amendment: Section 2B3.1(b)(2)(F) is amended by deleting "an express" and inserting in lieu thereof "a".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 6 by deleting "An 'express" and inserting in lieu thereof "'A"; by inserting after the first sentence the following additional sentence:

"Accordingly, the defendant does not have to state expressly his intent to kill the victim in order for the enhancement to apply.";

by deleting "an express" after "constitute" and inserting in lieu thereof "a"; by deleting "the underlying" and inserting in lieu thereof "this"; and by deleting "significantly greater fear than that necessary to constitute an element of the offense of robbery" and inserting in lieu thereof "a fear of death".

Reason for Amendment: This amendment addresses a circuit court conflict regarding the application of the "express threat of death" enhancement in §2B3.1 (Robbery). The amendment adopts the majority appellate view which holds that the enhancement applies when the combination of the defendant's actions and words would instill in a reasonable person in the position of the immediate victim (e.g.,a bank teller) a greater amount of fear than necessary to commit the robbery. See, e.g., United States v. Robinson, 86 F.3d 1197, 1202 (D.C. Cir. 1996) (enhancement applies if (1) a reasonable person in the position of the immediate victim would very likely believe the defendant made a threat and the threat was to kill, and (2) the victim likely thought his life was in peril); United States v. Murray, 65 F.3d 1161, 1167 (4th Cir. 1995) ("any combination of statements, gestures, or actions that would put an ordinary victim in reasonable fear for his or her life is an express threat of death").

Effective Date: The effective date of this amendment is November 1, 1997.

553. Amendment: The Commentary to §2B4.1 captioned "Statutory Provisions" is amended by deleting "§§ 11907(a), (b)" and inserting in lieu thereof "§ 11902".

The Commentary to §2N3.1 captioned "Statutory Provisions" is amended by deleting "15 U.S.C. §§ 1983-1988, 1990c" and inserting in lieu thereof "49 U.S.C. §§ 32703-32705, 32709(b).".

The Commentary to §2Q1.2 captioned "Statutory Provisions" is amended by deleting "§ 1809(b)" and inserting in lieu thereof "§ 60123(d)".

Reason for Amendment: This amendment makes technical corrections to §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), §2N3.1(Odometer Laws and Regulations), §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce), to reflect changes made to statutory references when Congress codified Title 49 (Transportation), United States Code. Pub. L. 103-272, § 1(e), July 5, 1994, 108 Stat. 1356; Pub. L. 104-88, Title I, § 102(a), December 29, 1995, 109 Stat. 850.

Effective Date: The effective date of this amendment is November 1, 1997.

554. Amendment: Section 2B5.1(b) is amended by inserting after subdivision (3) the following additional subdivision:

"(4) If any part of the offense was committed outside the United States, increase by 2 levels.".

The Commentary to §2B5.1 captioned "Statutory Provisions" is amended by deleting "471" and inserting in lieu thereof "470".

The Commentary to §2B5.1 captioned "Application Notes" is amended by redesignating Notes 1 through 3 as Notes 2 through 4; and by inserting as the new Note 1:

"1. For purposes of this guideline, 'United States' means each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.".

Reason for Amendment: This amendment addresses section 807(h) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1308, which requires the Commission to amend the sentencing guidelines to provide an appropriate enhancement for a defendant convicted of an international counterfeiting offense under 18 U.S.C. § 470. The amendment adds a specific offense characteristic in §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) to provide a two-level enhancement if the offense occurred outside the United States.

Effective Date: The effective date of this amendment is November 1, 1997.

555. Amendment: Section 2D1.1(b) is amended by redesignating subdivision (4) as subdivision (6) and inserting after subdivision (3) the following additional subdivisions:

"(4) If (A) the offense involved the importation of methamphetamine or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by 2 levels.

(5) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance, or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.".

Section 2D1.1(c) is amended in subdivision (1) by deleting "30 KG" before "or more of Methamphetamine" and inserting in lieu thereof "15 KG".

Section 2D1.1(c) is amended in subdivision (2) by deleting "10 KG but less than 30 KG" before "of Methamphetamine" and inserting in lieu thereof "5 KG but less than 15 KG".

Section 2D1.1(c) is amended in subdivision (3) by deleting "3 KG but less than 10 KG" before "of Methamphetamine" and inserting in lieu thereof "1.5 G but less than 5 KG".

Section 2D1.1(c) is amended in subdivision (4) by deleting "1 KG but less than 3 KG" before "of Methamphetamine" and inserting in lieu thereof "500 G but less than 1.5 KG".

Section 2D1.1(c) is amended in subdivision (5) by deleting "700 G but less than 1 KG" before "of Methamphetamine" and inserting in lieu thereof "350 G but less than 500 G".

Section 2D1.1(c) is amended in subdivision (6) by deleting "400 G but less than 700 G" before "of Methamphetamine" and inserting in lieu thereof "200 G but less than 350 G".

Section 2D1.1(c) is amended in subdivision (7) by deleting "100 G but less than 400 G" before "of Methamphetamine" and inserting in lieu thereof "50 G but less than 200 G".

Section 2D1.1(c) is amended in subdivision (8) by deleting "80 G but less than 100 G" before "of Methamphetamine" and inserting in lieu thereof "40 G but less than 50 G".

Section 2D1.1(c) is amended in subdivision (9) by deleting "60 G but less than 80 G" before "of Methamphetamine" and inserting in lieu thereof "30 G but less than 40 G".

Section 2D1.1(c) is amended in subdivision (10) by deleting "40 G but less than 60 G" before "of Methamphetamine" and inserting in lieu thereof "20 G but less than 30 G".

Section 2D1.1(c) is amended in subdivision (11) by deleting "20 G but less than 40 G" before "of Methamphetamine" and inserting in lieu thereof "10 G but less than 20 G".

Section 2D1.1(c) is amended in subdivision (12) by deleting "10 G but less than 20 G" before "of Methamphetamine" and inserting in lieu thereof "5 G but less than 10 G".

Section 2D1.1(c) is amended in subdivision (13) by deleting "5 G but less than 10 G" before "of Methamphetamine" and inserting in lieu thereof "2.5 G but less than 5 G".

Section 2D1.1(c) is amended in subdivision (14) by deleting "5 G" before "of Methamphetamine" and inserting in lieu thereof "2.5 G".

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" in the entry beginning "1 gm of Methamphetamine =" by deleting "1 kg" before "of marihuana" and inserting in lieu thereof "2 kg".

The Commentary to §2D1.1 captioned "Application Notes" is amended by inserting after Note 18 the following additional notes:

"19. If the offense involved importation of methamphetamine, and an adjustment from subsection (b)(2) applies, do not apply subsection (b)(4).

20. Under subsection (b)(5), the enhancement applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 5124, 9603(b). In some cases, the enhancement under this subsection may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §5B1.3 (Conditions of Probation) and §5D1.3 (Conditions of Supervised Release).".

The Commentary to §2D1.1 captioned "Background" is amended in the second paragraph by inserting as the last sentence "Where necessary, this scheme has been modified in response to specific congressional directives to the Commission.".

Reason for Amendment: This multi-part amendment responds to the Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237, 110 Stat. 3099, including the directives to the Commission in sections 301 and 303 of that Act. First, as directed by section 301 of the Act, the amendment increases penalties for methamphetamine trafficking offenses. This penalty increase is accomplished by reducing by one-half the quantity of a mixture or substance containing methamphetamine corresponding to each offense level in the Drug Quantity Table. This part of the amendment makes no change, however, in the quantities of methamphetamine (actual) (i.e., "pure" methamphetamine) and "Ice" methamphetamine that correspond to the various offense levels. The Commission has arrived at these particular changes after careful analysis of recent sentencing data, including its own intensive study of methamphetamine offenses, information provided by the Strategic Intelligence Section of the Drug Enforcement Administration concerning recent methamphetamine trafficking levels, dosage unit size, price, and drug quantity, and a variety of other information.

Second, in response to the directive in section 303 of the Act, this amendment provides an enhancement of two levels, with an invited upward departure in more extreme cases, for environmental violations occurring in association with an illicit manufacturing or other drug trafficking offense.

Third, in response to evidence of a recent, substantial increase in the importation of methamphetamine and precursor chemicals used to manufacture methamphetamine, the amendment provides an enhancement of two levels directed at such activity. An exception to this enhancement is provided for defendants who have a mitigating role in the offense under §3B1.2 (Mitigating Role).

Effective Date: The effective date of this amendment is November 1, 1997.

556. Amendment: Section 2D1.1(d) is amended by deleting "Reference" and inserting in lieu thereof "References";

and by inserting after subdivision (1) the following additional subdivision:

"(2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.".

Section 2D1.1(c)(10) is amended by deleting the period after "Schedule III substances" and inserting in lieu thereof a semicolon; and by inserting at the end the following additional subdivision:

"2,500 or more units of Flunitrazepam.".

Section 2D1.1(c)(11) is amended by deleting the period after "Schedule III substances" and inserting in lieu thereof a semicolon; and by inserting at the end the following additional subdivision:

"At least 1,250 but less than 2,500 units of Flunitrazepam.".

Section 2D1.1(c)(12) is amended by deleting the period after "Schedule III substances" and inserting in lieu thereof a semicolon; and by inserting at the end the following additional subdivision:

"At least 625 but less than 1,250 units of Flunitrazepam.".

Section 2D1.1(c)(13) is amended by deleting the period after "Schedule III substances" and inserting in lieu thereof a semicolon; and by inserting at the end the following additional subdivision:

"At least 312 but less than 625 units of Flunitrazepam.".

Section 2D1.1(c)(14) is amended by inserting after "Schedule III substances;" the following additional subdivision:

"At least 156 but less than 312 units of Flunitrazepam;";

and by inserting "(except Flunitrazepam)" after "Schedule IV substances".

Section 2D1.1(c)(15) is amended by inserting after "Schedule III substances;" the following additional subdivision:

"At least 62 but less than 156 units of Flunitrazepam;";

and by inserting "(except Flunitrazepam)" after "Schedule IV substances".

Section 2D1.1(c)(16) is amended by inserting after "Schedule III substances;" the following additional subdivision:

"Less than 62 units of Flunitrazepam;";

and by inserting "(except Flunitrazepam)" after "Schedule IV substances".

Section 2D1.1(c)(17) is amended by inserting "(except Flunitrazepam)" after "Schedule IV substances".

The Commentary to §2D1.1 captioned "Statutory Provisions" is amended by inserting "(7)," after "(3),".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the "Drug Equivalency Tables" by inserting before the subdivision captioned "Schedule I or II Depressants**" the following additional subdivision:

"Flunitrazepam **

1 unit of Flunitrazepam = 16 gm of marihuana

** Provided, that the combined equivalent weight of flunitrazepam, all Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances shall not exceed 99.99 kilograms of marihuana.

The minimum offense level from the Drug Quantity Table for flunitrazepam individually, or in combination with any Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the "Drug Equivalency Tables" in the subdivision captioned "Schedule I or II Depressants" by inserting an additional asterisk after "**" in both instances; and by inserting "(except flunitrazepam)" after "Schedule IV substances".

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 inserting an additional asterisk after "***" in both instances; and by inserting "(except flunitrazepam)" after "Schedule IV substances".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the "Drug Equivalency Tables" in the subdivision captioned "Schedule IV Substances" is amended by inserting "(except Flunitrazepam)" after "Substances"; by inserting an additional asterisk after "****" in both instances; by inserting "(except flunitrazepam)" after "Substance"; and by inserting "(except flunitrazepam)" before "and V".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned "Schedule V Substances" by inserting an additional asterisk after "*****" in both instances.

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 17 by adding at the end:

> "Similarly, in the case of a controlled substance for which the maximum offense level is less than level 38 (e.g., the maximum offense level in the Drug Quantity Table for flunitrazepam is level 20), an upward departure may be warranted if the drug quantity substantially exceeds the quantity for the highest offense level established for that particular controlled substance.".

Section 2D2.1(a)(2) is amended by inserting "flunitrazepam," after "cocaine,".

The Commentary to §2D2.1 is amended by inserting before "Background:":

> "Application Note:
>
> 1. The typical case addressed by this guideline involves possession of a controlled substance by the defendant for the defendant's own consumption. Where the circumstances establish intended consumption by a person other than the defendant, an upward departure may be warranted.".

Reason for Amendment: This amendment implements the directive to the Commission in the Drug-Induced Rape Prevention and Punishment Act of 1996, Pub. L. 104-305, 110 Stat. 3807. Section 2 of the Act directs the Commission to amend the guidelines to reflect the serious nature of offenses involving flunitrazepam. This amendment reflects the increases in statutory maximum penalties for offenses involving trafficking and simple possession, respectively, of flunitrazepam. In addition, the amendment contains a cross reference to cover the new offense created under this Act involving the distribution of a controlled substance to an individual in order to commit a crime of violence against that individual.

Effective Date: The effective date of this amendment is November 1, 1997.

557. Amendment: Section 2D1.11(d)(1)-(10), Note "E" (List Chemical Equivalency Table) of §2D1.11(d), and Note 4(a) of the Commentary to §2D1.11 captioned "Application Notes" are

repromulgated without change.

Reason for Amendment: Section 302 of the Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237, 110 Stat. 3099, directs the Commission to increase by at least two levels the offense levels for offenses involving list I chemicals under 21 U.S.C. §§ 841(d)(1) and (2) and 960(d)(1) and (3). Pursuant to this provision, the Commission promulgated an emergency amendment to §2D1.11, effective May 1, 1997. Under the terms of the congressionally-granted authority, the emergency amendment is temporary unless repromulgated in the next amendment cycle under regularly applicable amendment procedures. See Pub.L. 100-182, § 21set forth as an editorial note under 28 U.S.C. § 994. This amendment repromulgates §2D1.11(d)(1)-(10), Note "E" (List Chemical Equivalency Table) of §2D1.11(d), and Note 4(a) of the Commentary to §2D1.11 captioned "Application Notes", as set forth in the May 1, 1997 Revised Supplement to the 1995 edition of the Guidelines Manual.

Effective Date: The effective date of this amendment is November 1, 1997.

558. Amendment: Section 2D1.12 is amended by redesignating subsection (b) as subsection (c); and by inserting the following new subsection (b):

"(b) Specific Offense Characteristic

(1) If the defendant (A) intended to manufacture methamphetamine, or (B) knew, believed, or had reasonable cause to believe that prohibited equipment was to be used to manufacture methamphetamine, increase by 2 levels.".

The Commentary to §2D1.12 captioned "Application Notes" is amended in Note 2 by deleting "(b)(1)" and inserting in lieu thereof "(c)(1)".

Section 2D2.1(a)(3) is amended by inserting "or a list I chemical" after "controlled substance".

Reason for Amendment: This amendment implements the directive to the Commission in section 203 of the Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237, 110 Stat. 3099, to ensure that possession of equipment used to make methamphetamine is treated as a significant violation. Additionally, the amendment includes list I chemicals under §2D2.1 (Unlawful Possession; Attempt or Conspiracy), in response to section 201 of the Act, which amends 21 U.S.C. § 844 to include list I chemicals.

Effective Date: The effective date of this amendment is November 1, 1997.

559. Amendment: Section 2H4.1 is repromulgated without change.

Reason for Amendment: This amendment implements section 218 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009, which directs the Commission to review the guideline for peonage, involuntary servitude, and slave trade offenses and amend the guideline pursuant to that review. Pursuant to the emergency amendment authority of that Act, this amendment previously was promulgated as a temporary measure effective May 1, 1997.

Effective Date: The effective date of this amendment is November 1, 1997.

560. Amendment: The Commentary to §2K1.5 captioned "Background" is amended by deleting:

> "Except under the circumstances specified in 49 U.S.C. § 46505(c), the offense covered by this section is a misdemeanor for which the maximum term of imprisonment authorized by statute is one year.";

by deleting "An" and inserting in lieu thereof "This guideline provides an"; and by deleting "is provided" immediately after "enhancement".

Reason for Amendment: This amendment strikes background commentary in guideline §2K1.5 that is no longer correct because of a recent change in statutory penalties. Specifically, the Antiterrorism Act of 1996 increased the statutory maximum penalty for violations of 49 U.S.C. § 46505(b) from not more than one year to not more than 10 years. This increase changes the classification of an offense under subsection (b) from a class A misdemeanor to a class D felony.

Effective Date: The effective date of this amendment is November 1, 1997.

561. Amendment: Section 2L1.1 is repromulgated with the following changes:

Section 2L1.1(b)(1)(A) is amended by deleting "the defendant committed the offense" and inserting in lieu thereof "the offense was committed".

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

> "'The defendant committed the offense other than for profit' means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens. The 'number of unlawful aliens smuggled, transported, or harbored' does not include the defendant.",

and inserting in lieu thereof:

> "'The offense was committed other than for profit' means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.
>
> 'Number of unlawful aliens smuggled, transported, or harbored' does not include the defendant.".

Section 5K2.0 is amended in the third paragraph by deleting "immigration violations" and inserting in lieu thereof "other guidelines"; and by deleting "for an immigration violation" and inserting in lieu thereof "under one of these other guidelines".

Reason for Amendment: This amendment implements section 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009, which directs the Commission to amend the guidelines for offenses related to smuggling, transporting,

or harboring illegal aliens. Pursuant to the emergency amendment authority of that Act, this amendment previously was promulgated as a temporary measure effective May 1, 1997. This version of the amendment changes §2L1.1(b)(1)(A)(pertaining to a reduction for non-profit offenses) to narrow somewhat the class of cases that would qualify for the reduced offense level under that provision. This amendment also makes a conforming change to §5K2.0.

Effective Date: The effective date of this amendment is November 1, 1997.

562. Amendment: Section 2L1.2 is amended by deleting subsection (b) as follows:

"(b) Specific Offense Characteristics

If more than one applies, use the greater:

(1) If the defendant previously was deported after a conviction for a felony, other than a felony involving violation of the immigration laws, increase by 4 levels.

(2) If the defendant previously was deported after a conviction for an aggravated felony, increase by 16 levels.",

and inserting in lieu thereof:

"(b) Specific Offense Characteristic

(1) If the defendant previously was deported after a criminal conviction, or if the defendant unlawfully remained in the United States following a removal order issued after a criminal conviction, increase as follows (if more than one applies, use the greater):

(A) If the conviction was for an aggravated felony, increase by 16 levels.

(B) If the conviction was for (i) any other felony, or (ii) three or more misdemeanor crimes of violence or misdemeanor controlled substance offenses, increase by 4 levels.".

The Commentary to §2L1.2 captioned "Application Notes" is amended by deleting Notes 3 and 4 as follows:

"3. A 4-level increase is provided under subsection (b)(1) in the case of a defendant who was previously deported after a conviction for a felony, other than a felony involving a violation of the immigration laws.

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.";

by redesignating Notes 1 and 2 as Notes 2 and 3, respectively; by deleting in Note 3, as

redesignated, "without criminal conviction" after "deportation"; and by inserting the following as the new Note 1:

"1. For purposes of this guideline—

'Deported after a conviction,' means that the deportation was subsequent to the conviction, whether or not the deportation was in response to such conviction. An alien has previously been 'deported' if he or she has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

'Remained in the United States following a removal order issued after a conviction,' means that the removal order was subsequent to the conviction, whether or not the removal order was in response to such conviction.

'Aggravated felony,' is defined at 8 U.S.C. § 1101(a)(43) without regard to the date of conviction of the aggravated felony.

'Crime of violence' and 'controlled substance offense' are defined in §4B1.2. For purposes of subsection (b)(1)(B), 'crime of violence' includes offenses punishable by imprisonment for a term of one year or less.

'Firearms offense' means any offense covered by Chapter Two, Part K, Subpart 2, or any similar offense under state or local law.

'Felony offense' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.".

The Commentary to §2L1.2 captioned "Application Notes" is amended by redesignating Note 5 as Note 4; in Note 4, as redesignated, by deleting "(b)(1) or (b)(2)" and inserting in lieu thereof "(b)"; and by inserting after Note 4, as redesignated, the following new note:

"5. Aggravated felonies that trigger the adjustment from subsection (b)(1)(A) vary widely. If subsection (b)(1)(A) applies, and (A) the defendant has previously been convicted of only one felony offense; (B) such offense was not a crime of violence or firearms offense; and (C) the term of imprisonment imposed for such offense did not exceed one year, a downward departure may be warranted based on the seriousness of the aggravated felony.".

The Commentary to §2L1.2 captioned "Application Notes" is amended by deleting Notes 6 and 7 as follows:

"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 implements sections 321 and 334 of the Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009. Section 321 of the Act adds to the definition of "aggravated felony" crimes of rape and sexual abuse of a minor, as well as any crime of violence for which the term of imprisonment is at least one year. This amendment conforms the definition of "aggravated felony" in the guidelines with the amended definition in the Immigration and Nationality Act.

Section 334 directs the Sentencing Commission to promulgate amendments to the guidelines for the crimes of unlawfully remaining and illegally entering the United States corresponding to changes made in statutory penalties for these offenses in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796. This amendment enhances penalties for those who unlawfully enter or remain in the United States following conviction for an aggravated felony, any other felony, or three misdemeanor crimes of violence or controlled substance offenses. The amendment also makes clarifying changes to the commentary.

Effective Date: The effective date of this amendment is November 1, 1997.

563. Amendment: Section 2L2.1 is repromulgated with the following changes:

Section 2L2.1(b) is amended by deleting:

"(1) If the defendant committed the offense other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child (or both the defendant's spouse and child), decrease by 3 levels.",

and inserting in lieu thereof:

"(1) If the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child (or both the defendant's spouse and child), decrease by 3 levels.".

The Commentary to §2L2.1 captioned "Application Notes" is amended in Note 1 by deleting:

"'The defendant committed the offense other than for profit' means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any

of the unlawful aliens.",

and inserting in lieu thereof:

"'The offense was committed other than for profit' means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.".

Section 2L2.2 is repromulgated without change.

Reason for Amendment: This amendment implements section 211 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009, which directs the Commission to amend the guidelines for offenses related to the fraudulent use of government-issued documents. Pursuant to the emergency amendment authority of that Act, this amendment previously was promulgated as a temporary measure effective May 1, 1997. This version of the amendment changes §2L2.1(b)(1)(pertaining to a reduction for non-profit offenses) to narrow somewhat the class of cases that would qualify for the reduced offense level under that provision.

Effective Date: The effective date of this amendment is November 1, 1997.

564. Amendment: Section 3A1.1(a) is amended by inserting "of conviction" after "the offense".

The Commentary to §3A1.1 captioned "Application Notes" is amended in Note 2 by inserting at the beginning the following new paragaph:

"For purposes of subsection (b), 'victim' includes any person who is a victim of the offense of conviction and any conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct).".

Reason for Amendment: This amendment addresses a circuit court conflict regarding whether "victim of the offense" in §3A1.1 (Hate Crime Motivation or Vulnerable Victim) refers only to a victim of the defendant's offense of conviction or, more broadly, to a victim of any relevant conduct. The amendment adopts the majority appellate view, which holds that a sentencing court should consider the defendant's relevant conduct when determining whether the vulnerable victim enhancement applies. See, e.g., United States v. Haggard, 41 F.3d 1320, 1326 (9th Cir. 1994) (proper to consider harm caused to victims beyond the defendant's offense of conviction); United States v. Yount, 960 F.2d 955 (11th Cir. 1992).

This amendment also clarifies a possible ambiguity regarding the scope of conduct to be considered when applying the hate crime motivation enhancement in §3A1.1(a). Consistent with Congress's intent to punish a defendant whose primary objective in committing the hate crime was to harm a member of a particular class of individuals, this amendment clarifies that the enhancement in subsection (a) is limited to victims of the defendant's offense of conviction.

Effective Date: The effective date of this amendment is November 1, 1997.

565. Amendment: Section 3A1.4 is repromulgated without change.

Reason for Amendment: Section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1303, requires the Commission to amend the sentencing guidelines so that the adjustment in §3A1.4 (relating to international terrorism) applies more broadly to "Federal crimes of terrorism," as defined in 18 U.S.C. § 2332b(g). Pursuant to this provision, the Commission promulgated §3A1.4 (Terrorism) as an emergency amendment, effective November 1, 1996. Under the terms of the congressionally granted authority, this amendment is temporary unless repromulgated in the next amendment cycle under regularly applicable amendment procedures. See Pub. L. No. 100-182, § 21, set forth as an editorial note under 28 U.S.C. § 994. This amendment repromulgates §3A1.4, as set forth in the May 1, 1997 Revised Supplement to the 1995 Guidelines Manual.

Effective Date: The effective date of this amendment is November 1, 1997.

566. Amendment: The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 1 by deleting in the third sentence "such testimony or statements should be evaluated in a light most favorable to the defendant." and inserting in lieu thereof:

> "the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 3(i) by deleting "conduct prohibited by 18 U.S.C. §§ 1501-1516." and inserting in lieu thereof "other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., 18 U.S.C. §§ 1510, 1511).".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 4 by deleting "The following is a non-exhaustive list of examples of the" and inserting in lieu thereof "Some"; by deleting "that, absent a separate count of conviction for such conduct," and inserting in lieu thereof "ordinarily"; by deleting ", but ordinarily can appropriately be sanctioned by the determination of the particular" and inserting in lieu thereof "but may warrant a greater"; and by inserting the following after "guideline range":

> ". However, if the defendant is convicted of a separate count for such conduct, this enhancement will apply and increase the offense level for the underlying offense (i.e., the offense with respect to which the obstructive conduct occurred). See Application Note 7, below.
>
> The following is a non-exhaustive list of examples of the types of conduct to which this application note applies".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 6 by deleting:

> "Where the defendant is convicted both of the obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of §3D1.2 (Groups of Closely Related Counts). The offense level for that group of closely related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the

offense level for the obstruction offense, whichever is greater.".

The Commentary to §3C1.1 captioned "Application Notes" is amended by redesignating Note 7 as Note 8; and by inserting the following as new Note 7:

"7. Where the defendant is convicted both of the obstruction offense and the underlying offense (the offense with respect to which the obstructive conduct occurred), 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: This amendment addresses a circuit court conflict regarding the meaning of the last sentence of Application Note 1 in §3C1.1. The issue is whether that sentence requires the use of a heightened standard of proof when the court applies an enhancement for perjury. Compare United States v. Montague, 40 F.3d 1251 (D.C. Cir. 1994) (applying the clear and convincing standard) with United States v. Zajac, 62 F.3d 145 (6th Cir.) (applying the preponderance of the evidence standard), cert. denied 116 S. Ct. 681 (1995). The amendment changes the last sentence of Application Note 1 so that it no longer suggests the use of a heightened standard of proof. Instead, it clarifies that the court should be mindful that not all inaccurate testimony or statements reflect a willful attempt to obstruct justice.

The amendment also (A) modifies subdivision (i) of Application Note 3 in §3C1.1 to make the language more precise; (B) in response to concerns expressed in a Seventh Circuit opinion, clarifies the meaning of the phrase "absent a separate count of conviction" by adding an additional sentence at the end of Application Note 4, see United States v. Giacometti, 28 F.3d 698 (7th Cir. 1994); and (C) clarifies that the guidance in the last two sentences of Application Note 6 applies to a broader set of cases than the cases described in the first two sentences of Application Note 6.

Effective Date: The effective date of this amendment is November 1, 1997.

567. Amendment: The Commentary to §4B1.1 captioned "Application Notes" is amended in Note 2 by deleting "not" after "offense," in the first sentence; by deleting "(b)(1)(B), (b)(1)(C), and (b)(1)(D)" and inserting in lieu thereof "(B), (C), and (D)"; by deleting "where" and inserting in lieu thereof "in a case in which"; by inserting "for that defendant" after "Maximum'"; by deleting "twenty years and not thirty years" and inserting in lieu thereof "thirty years and not twenty years"; by deleting "authorizes" and inserting in lieu thereof "has"; and by deleting "maximum term of imprisonment" and inserting in lieu thereof "offense statutory maximum".

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

"The legislative history of this provision suggests that the phrase 'maximum term authorized' should be construed as the maximum term authorized by statute. See S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983); 128 Cong. Rec. 26,511-12 (1982) (text of 'Career Criminals' amendment by Senator Kennedy); id. at 26,515 (brief summary of

amendment); id. at 26,517-18 (statement of Senator Kennedy).".

Reason for Amendment: This amendment responds to United States v. LaBonte, 520 U.S. 751. In LaBonte, the Supreme Court held that the way in which the Commission defined "maximum term authorized", for purposes of fulfilling the requirement under 28 U.S.C. § 994(h) to specify sentences for certain categories of career offenders at or near the maximum term authorized for those offenders, is inconsistent with § 994(h)'s plain and unambiguous language and is therefore invalid. The Commission defined "maximum term authorized" to mean the maximum term authorized for the offense of conviction not including any sentencing enhancement provisions that apply because of the defendant's prior criminal record. The Supreme Court held that under § 994's plain and unambiguous language, "maximum term authorized" must be read to include all applicable statutory sentencing enhancements. The proposed amendment makes a straightforward change to the commentary to §4B1.1, the career offender guideline, to reflect the LaBonte decision. Specifically, the definition of "maximum term authorized" is proposed to be changed to reflect that the "maximum term authorized" includes all sentencing enhancements that apply because of the defendant's prior criminal record.

Effective Date: The effective date of this amendment is November 1, 1997.

568. Amendment: Section §4B1.2(1) is amended by deleting "(1)" and inserting in lieu thereof "(a)"; by inserting a comma after "law" and after "one year"; by deleting "(i)" and inserting in lieu thereof "(1)"; and by deleting "(ii)" and inserting in lieu thereof "(2)".

Section §4B1.2(2) is amended by deleting "(2)" and inserting in lieu thereof "(b)"; by deleting "a" after "under"; and by deleting "prohibiting" and inserting in lieu thereof ", punishable by imprisonment for a term exceeding one year, that prohibits".

Section §4B1.2(3) is amended by deleting "(3)" and inserting in lieu thereof "(c)"; by deleting "(A)" and inserting in lieu thereof "(1)"; and by deleting "(B)" and inserting in lieu thereof "(2)".

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 1 by inserting at the beginning "For purposes of this guideline—"; by deleting "The terms 'crime" and inserting in lieu thereof "'Crime";

and by inserting at the end the following new paragraphs:

> "'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 as 'crimes of violence' if (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.
>
> 'Crime of violence' does not include the offense of unlawful possession of a firearm by

a felon. Where the instant offense of conviction 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 had 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.

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(d)(1)) is a 'controlled substance offense.'

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a 'controlled substance offense.'

Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a 'controlled substance offense' if the offense of conviction established that the underlying offense (the offense facilitated) was a 'controlled substance offense.'

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a 'controlled substance offense' if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a 'controlled substance offense.'

Possessing a firearm during and in relation to a crime of violence or drug offense (18 U.S.C. § 924(c)) is a 'crime of violence' or 'controlled substance offense' if the offense of conviction established that the underlying offense (the offense during and in relation to which the firearm was carried or possessed) was a 'crime of violence' or 'controlled substance offense.' (Note that if the defendant also was convicted of the underlying offense, the two convictions will be treated as related cases under §4A1.2 (Definitions and Instruction for Computing Criminal History)).

'Prior felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. 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).".

The Commentary to §4B1.2 captioned "Application Notes" is amended by deleting Notes 2 and 3 as follows:

"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 (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 of conviction 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.

3. 'Prior felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. 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).";

and by inserting after Note 1 the following new Note 2:

"2. Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry.".

The Commentary to §4B1.2 captioned "Application Notes" is amended by redesignating Note 4 as Note 3.

The Commentary to §2K1.3 captioned "Application Notes" is amended in Note 2 by deleting "Note 3" and inserting in lieu thereof "Note 1".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 5 by deleting "Note 3" and inserting in lieu thereof "Note 1".

The Commentary to §7B1.1 captioned "Application Notes" is amended in Note 2 by deleting "§4B1.2(1)" and inserting in lieu thereof "§4B1.2(a)"; and by deleting "Notes 1 and 2" and inserting in lieu thereof "Note 1".

The Commentary to §7B1.1 captioned "Application Notes" is amended in Note 3 by deleting

"§4B1.2(2)" and inserting in lieu thereof "§4B1.2(b)".

Reason for Amendment: This amendment addresses a circuit court conflict regarding whether the offenses of possessing a listed chemical with intent to manufacture a controlled substance or possessing a prohibited flask or equipment with intent to manufacture a controlled substance are "controlled substance offenses" under the career offender guideline. Compare United States v. Calverley, 11 F.3d 505 (5th Cir. 1993) (possession of a listed chemical with intent to manufacture a controlled substance is a controlled substance offense under §4B1.2) with United States v. Wagner, 994 F.2d 1467, 1475 (10th Cir. 1993) (possession of a listed chemical with intent to manufacture a controlled substance is not a controlled substance offense). This amendment makes each of these offenses a "controlled substance offense" under the career offender guideline. This decision is based on the Commission's view that there is such a close connection between possession of a listed chemical or prohibited flask or equipment with intent to manufacture a controlled substance and actually manufacturing a controlled substance that the former offenses are fairly considered as controlled substance trafficking offenses.

The amendment also clarifies that certain other offenses are "crimes of violence" or "controlled substance offenses" if the offense of conviction established that the underlying offense was a "crime of violence" or "controlled substance offense." See United States v. Baker, 16 F.3d 854 (8th Cir. 1994); United States v. Vea-Gonzalez, 999 F.2d 1326 (9th Cir. 1993), effectively overruled on other grounds by Custis v. United States, 114 S.Ct. 1732 (1994). Additionally, the amendment makes the following nonsubstantive changes to §4B1.2 to improve the internal consistency of the guidelines: (A) adding the phrase "punishable by a term of imprisonment of more than one year, that prohibits" in subsection (2) to make it consistent with subsection (1); and (B) conforming the second paragraph of Application Note 2 of §4B1.2 to the language of §§2K1.3 and 2K2.1.

Effective Date: The effective date of this amendment is November 1, 1997.

569. Amendment: Chapter Five, Part B, Subpart 1 is amended by deleting §§5B1.3 and 5B1.4 in their entirety as follows:

"§5B1.3. Conditions of Probation

(a) If a term of probation is imposed, the court shall impose a condition that the defendant shall not commit another federal, state, or local crime during the term of probation. 18 U.S.C. § 3563(a)(1). The court shall also impose a condition that the defendant not possess illegal controlled substances. 18 U.S.C. § 3563(a)(3).

(b) The court may impose other conditions that (1) are reasonably related to the nature and circumstances of the offense, the history and characteristics of the defendant, and the purposes of sentencing and (2) involve only such deprivations of liberty or property as are reasonably necessary to effect the purposes of sentencing. 18 U.S.C. § 3563(b). Recommended conditions are set forth in §5B1.4.

(c) If a term of probation is imposed for a felony, the court shall impose at least one of the following as a condition of probation: a fine, an order of restitution, or community service, unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the other conditions set forth under 18 U.S.C. § 3563(b). 18 U.S.C. § 3563(a)(2).

(d) Intermittent confinement (custody for intervals of time) may be ordered as a condition of probation during the first year of probation. 18 U.S.C. § 3563(b)(11). Intermittent confinement shall be credited toward the guideline term of imprisonment at §5C1.1 as provided in the schedule at §5C1.1(e).

Commentary

A broader form of the condition required under 18 U.S.C. § 3563(a)(3) (pertaining to possession of controlled substances) is set forth as recommended condition (7) at §5B1.4 (Recommended Conditions of Probation and Supervised Release).

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

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

(1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;

(2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

(3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(4) the defendant shall support his dependents and meet other family responsibilities;

(5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

(6) the defendant shall notify the probation officer within seventy-two hours of any change in residence or

employment;

(7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

(8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;

(9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

(10) the defendant shall permit a probation officer to visit him at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

(11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

(12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

(13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

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

(14) Possession of Weapons

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

firearm or other dangerous weapon.

(15) Restitution

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

(16) Fines

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

(17) Debt Obligations

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

(18) Access to Financial Information

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

(19) Community Confinement

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

(20) Home Detention

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

(21) Community Service

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

(22) Occupational Restrictions

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

(23) Substance Abuse Program Participation

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

(24) Mental Health Program Participation

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

(25) Curfew

If the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to provide just punishment for the offense, to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant, a condition of curfew is recommended. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

Commentary

Application Note:

1. Home detention, as defined by §5F1.2, may only be used as a substitute for imprisonment. See §5C1.1 (Imposition of a Term of Imprisonment). Under home detention, the defendant, with specified exceptions, is restricted to his place

of residence during all non-working hours. Curfew, which limits the defendant to his place of residence during evening and nighttime hours, is less restrictive than home detention and may be imposed as a condition of probation whether or not imprisonment could have been ordered.".

A replacement guideline with accompanying commentary is inserted as §5B1.3 (Conditions of Probation).

Chapter Five, Part D, Subpart 1 is amended by deleting §5D1.3 in its entirety as follows:

"§5D1.3. Conditions of Supervised Release

(a) If a term of supervised release is imposed, the court shall impose a condition that the defendant not commit another federal, state, or local crime. 18 U.S.C. § 3583(d). The court shall also impose a condition that the defendant not possess illegal controlled substances. 18 U.S.C. § 3563(a)(3).

(b) The court may impose other conditions of supervised release, to the extent that such conditions are reasonably related to (1) the nature and circumstances of the offense and the history and characteristics of the defendant, and (2) the need for the sentence imposed to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. 18 U.S.C. §§ 3553(a)(2) and 3583(d).

(c) Recommended conditions of supervised release are set forth in §5B1.4.

Commentary

Background: This section applies to conditions of supervised release. The conditions generally recommended for supervised release are those recommended for probation. See §5B1.4. A broader form of the condition required under 18 U.S.C. § 3563(a)(3) (pertaining to possession of controlled substances) is set forth as recommended condition (7) at §5B1.4 (Recommended Conditions of Probation and Supervised Release).".

A replacement guideline with accompanying commentary is inserted as §5D1.3 (Conditions of Supervised Release).

The Commentary to §2X5.1 captioned "Application Note" is amended in Note 1 by deleting: "§5B1.4 (Recommended Conditions of Probation and Supervised Release);".

Section 5H1.3 is amended by deleting "recommended condition (24) at §5B1.4 (Recommended Conditions of Probation and Supervised Release)" and inserting in lieu thereof "§§5B1.3(d)(5) and 5D1.3(d)(5)".

Section 5H1.4 is amended in the second paragraph by deleting "recommended condition (23) at §5B1.4 (Recommended Conditions of Probation and Supervised Release)" and inserting in lieu thereof "§5D1.3(d)(4)"; and in the third paragraph by deleting "recommended condition (23) at §5B1.4 (Recommended Conditions of Probation and Supervised Release)" and inserting in lieu thereof "§5B1.3(d)(4)".

Section 8D1.3(a) is amended by deleting "shall" immediately after "organization".

Section 8D1.3(b) is amended by deleting "a fine, restitution, or community service," and inserting in lieu thereof "(1) restitution, (2) notice to victims of the offense pursuant to 18 U.S.C. § 3555, or (3) an order requiring the organization to reside, or refrain from residing, in a specified place or area,";

and by adding at the end:

> "Note: Section 3563(a)(2) of Title 18, United States Code, provides that, absent unusual circumstances, a defendant convicted of a felony shall abide by at least one of the conditions set forth in 18 U.S.C. § 3563(b)(2), (b)(3), and (b)(13). Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, those conditions were a fine ((b)(2)), an order of restitution ((b)(3)), and community service ((b)(13)). Whether or not the change was intended, the Act deleted the fine condition and renumbered the restitution and community service conditions in 18 U.S.C. § 3563(b), but failed to make a corresponding change in the referenced paragraphs under 18 U.S.C. § 3563(a)(2). Accordingly, the conditions now referenced are restitution ((b)(2)), notice to victims pursuant to 18 U.S.C. § 3555 ((b)(3)), and an order that the defendant reside, or refrain from residing, in a specified place or area ((b)(13)).".

Reason for Amendment: The purposes of this amendment are twofold. First, the amendment revises the pertinent guidelines to reflect statutorily required conditions of probation and supervised release added by Section 203 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1227, and other laws. Second, the amendment revises §§5B1.3 (Conditions of Probation), 5B1.4 (Recommended Conditions of Probation and Supervised Release), and 5D1.3 (Conditions of Supervised Release) so as to better distinguish among the statutorily required, standard, and special conditions of probation and supervised release. Section 5B1.4 has been eliminated. Provisions of §5B1.4 relating to recommended conditions of probation have been incorporated into §5B1.3, and provisions of §5B1.4 relating to recommended conditions of supervised release have been incorporated into §5D1.3.

Effective Date: The effective date of this amendment is November 1, 1997.

570. Amendment: Section 5D1.2(a) is amended by deleting "If" and inserting in lieu thereof "Subject to subsection (b), if".

Section 5D1.2(b) is amended by deleting "Provided, that" and inserting in lieu thereof "Except as otherwise provided,"; and by deleting "in no event" and inserting in lieu thereof "not"

The Commentary to §5D1.2 is amended by inserting the following before "Background":

"Application Notes:

1. A defendant who qualifies under §5C1.2 (Applicability of Statutory Minimum Sentence in Certain Cases) is not subject to any statutory minimum sentence of supervised release. See 18 U.S.C. § 3553(f). In such a case, the term of supervised release shall be determined under subsection (a).

2. Upon motion of the Government, a defendant who has provided substantial assistance in the investigation or prosecution of another person who has committed an offense may be sentenced to a term of supervised release that is less than any minimum required by statute or the guidelines. See 18 U.S.C. § 3553(e), §5K1.1 (Substantial Assistance to Authorities).".

The Commentary to §5C1.2 captioned "Application Notes" is amended by inserting after Note 8 the following additional note:

"9. A defendant who meets the criteria under this section is exempt from any otherwise applicable statutory minimum sentence of imprisonment and statutory minimum term of supervised release.".

Reason for Amendment: This amendment amends §5D1.2 (Term of Supervised Release) to make clear that a defendant who qualifies under the "safety valve" (§5C1.2, 18 U.S.C. § 3553(f)), or who is the beneficiary of a Government substantial assistance motion under 18 U.S.C. § 3553(e), is not subject to any statutory minimum term of supervised release. This issue has arisen in a number of hotline calls. This amendment also clarifies that the requirement in subsection (a), with respect to the length of a term of supervised release, is subject to the requirement in subsection (b) that the term be not less than any statutorily required term of supervised release.

Effective Date: The effective date of this amendment is November 1, 1997.

571. Amendment: Chapter Five, Part E, Subpart 1 is amended by deleting §5E1.1 in its entirety as follows:

"§5E1.1. Restitution

(a) The court shall --

(1) enter a restitution order if such order is authorized under 18 U.S.C. §§ 3663-3664; or

(2) if a restitution order would be authorized under 18 U.S.C. §§ 3663-3664, except for the fact that the offense of conviction is not an offense set forth in Title 18, United States Code, or 49 U.S.C. § 46312, § 46502, or § 46504, impose a term of probation or supervised release with a condition requiring restitution.

(b) *Provided*, that the provisions of subsection (a) do not apply when full restitution has been made, or to the extent the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of a restitution requirement outweighs the need to provide restitution to any victims through the criminal process.

(c) If a defendant is ordered to make restitution and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.

(d) With the consent of the victim of the offense, the court may order a defendant to perform services for the benefit of the victim in lieu of monetary restitution or in conjunction therewith. 18 U.S.C. § 3663(b)(4).

Commentary

Application Note:

1. In the case of a conviction under certain statutes, additional requirements regarding restitution apply. See 18 U.S.C. §§ 2248 and 2259 (applying to convictions under 18 U.S.C. §§ 2241-2258 for sexual-abuse offenses and sexual exploitation of minors); 18 U.S.C. § 2327 (applying to convictions under 18 U.S.C. §§ 1028-1029, 1341-1344 for telemarketing-fraud offenses); 18 U.S.C. § 2264 (applying to convictions under 18 U.S.C. §§ 2261-2262 for domestic-violence offenses). To the extent that any of the above-noted statutory provisions conflict with the provisions of this guideline, the applicable statutory provision shall control.

Background: Section 3553(a)(7) of Title 18 requires the court, 'in determining the particular sentence to be imposed,' to consider 'the need to provide restitution to any victims of the offense.' Section 3556 of Title 18 authorizes the court to impose restitution in accordance with 18 U.S.C. §§ 3663 and 3664, which authorize restitution for violations of Title 18 or 49 U.S.C. § 46312, § 46502, or § 46504. For other offenses, restitution may be imposed as a condition of probation or supervised release. See 18 U.S.C. § 3563(b)(3) as amended by Section 7110 of Pub. L. No. 100-690 (1988).

A court's authority to decline to order restitution is limited. Subsection (a)(1) of this guideline requires the court to order restitution for offenses under Title 18, United States Code, or 49 U.S.C. § 46312, § 46502, or § 46504, unless full restitution has already been made or 'the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution . . . outweighs the need to provide restitution to any victims.' 18 U.S.C. § 3663(d). The legislative history of 18 U.S.C. § 3579, the precursor of 18 U.S.C. § 3663, states that even '[i]n those unusual

cases where the precise amount owed is difficult to determine, the section authorizes the court to reach an expeditious, reasonable determination of appropriate restitution by resolving uncertainties with a view toward achieving fairness to the victim.' S. Rep. No. 532, 97th Cong., 2d Sess. 31, reprinted in 1982 U.S. Code Cong. & Ad. News 2515, 2537. If the court does not order restitution, or orders only partial restitution, it must state its reasons for doing so. 18 U.S.C. § 3553(c). 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. § 46312, § 46502, or § 46504.

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

Pursuant to Rule 32(b)(4)(D), Federal Rules of Criminal Procedure, the probation officer's presentence investigation report must contain a victim impact statement. That report must contain information about the financial impact on the victim and the defendant's financial condition. The sentencing judge may base findings on the presentence report or other testimony or evidence supported by a preponderance of the evidence. 18 U.S.C. § 3664(d).

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

A replacement guideline with accompanying commentary is inserted as §5E1.1 (Restitution).

Chapter Eight, Part B, Subpart 1 is amended by deleting §8B1.1 in its entirety as follows:

"§8B1.1. Restitution - Organizations

(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), sentence the organization to probation with a

condition requiring restitution.

(b) *Provided*, that the provisions of subsection (a) do not apply when the organization has made full restitution, 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.

Commentary

Background: This guideline provides for restitution either as a sentence under 18 U.S.C. §§ 3663-3664 or as a condition of probation.".

A replacement guideline with accompanying commentary is inserted as §8B1.1 (Restitution - Organizations).

Reason for Amendment: This amendment conforms the provisions of §§5E1.1 and 8B1.1 to section 204 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1227, which includes procedures for payment of full restitution to a victim of the offense. The amendment also implements the directive to the Commission in section 205 of the Act to issue guidelines to assist courts in determining an appropriate amount of "community restitution" when the defendant is convicted of certain drug offenses and there is no identifiable victim of the offense. As a starting point, the Commission has elected to issue a guideline that permits broad court discretion to determine an amount of community restitution not exceeding the fine imposed. Over time, the Commission intends to evaluate and refine this guideline in light of sentencing experience.

Effective Date: The effective date of this amendment is November 1, 1997.

572. Amendment: Section §5E1.2(b) is amended by deleting "Except as provided in subsections (f) and (i) below, or otherwise required by statute, the fine imposed shall be within the range" and inserting in lieu thereof "The applicable fine guideline range is that".

Section 5E1.2(c)(1) is amended by inserting "guideline" after "fine".

Section 5E1.2(c)(2) is amended by inserting "guideline" after "fine".

Section 5E1.2(d) is amended in subdivision (6) by deleting "and"; by redesignating subdivision (7) as subdivision (8); and by inserting after subdivision (6) the following new subdivision (7):

"(7) the expected costs to the government of any term of probation, or term of imprisonment and term of supervised release imposed; and".

Section 5E1.2 is amended by deleting "(e)"; by redesignating subsections (f), (g), and (h) as subsections (e), (f), and (g) respectively; and by deleting:

"(i) Notwithstanding of the provisions of subsection (c) of this section, but subject to the provisions of subsection (f) herein, the court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered.".

The Commentary to §5E1.2 captioned "Application Notes" is amended in Note 6 by deleting "§5E1.2" and inserting in lieu thereof "this section".

The Commentary to §5E1.2 captioned "Application Notes" is amended in Note 7 by deleting:

"Subsection (i) provides for an additional fine sufficient to pay the costs of any imprisonment, probation, or supervised release ordered, subject to the defendant's ability to pay as prescribed in subsection (f). In making a determination as to the amount of any fine to be imposed under this provision,"

and inserting in lieu thereof "In considering subsection (d)(7),".

Reason for Amendment: This amendment indirectly addresses a circuit court conflict regarding whether a court may impose a fine for costs of imprisonment and/or supervision when it has not imposed any punitive fine. Compare, United States v. Labat, 915 F.2d 603 (10th Cir. 1990)(requiring imposition of punitive fine before costs of imprisonment fine can be imposed) with United States v. Sellers, 42 F.3d 116 (2d Cir. 1994)(not requiring imposition of punitive fine before ordering costs of imprisonment fine), cert. denied, 116 S.Ct. 93 (1995).

Recognizing that a fine for costs of imprisonment and/or supervision is not statutorily required and rarely is imposed, the Commission has elected to dispense with the requirement that courts determine a separate, additional fine for such costs. Instead, the amendment provides that the court shall take such costs into consideration in determining the appropriate amount of a punitive fine.

Because, under the amended procedure, it no longer will be necessary to determine a separate fine increment for costs associated with implementing the sentence, the issue on which the circuit courts have differed should not arise. This procedure also should substantially simplify fine calculations, thereby allowing court and probation officer resources to be used more efficiently and productively.

Effective Date: The effective date of this amendment is November 1, 1997.

573. Amendment: The Commentary to §5E1.3 captioned "Background" is amended by deleting the entire text as follows:

"Background: The Victims of Crime Act of 1984, Pub. L. No. 98-473, Title II, Chap. XIV, requires the courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation. Monies deposited in the fund are awarded to the states by the Attorney General for victim assistance and compensation programs. Under the Victims of Crime Act, as amended by Section 7085 of the Anti-Drug Abuse Act of 1988, the court is required to impose assessments in the following amounts with respect to offenses committed on or after

November 18, 1988:

Individuals:

$5, if the defendant is an individual convicted of an infraction or a Class C misdemeanor;
$10, if the defendant is an individual convicted of a Class B misdemeanor;
$25, if the defendant is an individual convicted of a Class A misdemeanor; and
$50, if the defendant is an individual convicted of a felony.

Organizations:

$50, if the defendant is an organization convicted of a Class B misdemeanor;
$125, if the defendant is an organization convicted of a Class A misdemeanor; and
$200, if the defendant is an organization convicted of a felony. 18 U.S.C. § 3013.

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

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

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

and inserting in lieu thereof:

"Application Notes:

1. This guideline applies only if the defendant is an individual. See §8E1.1 for special assessments applicable to organizations.

2. The following special assessments are provided by statute (18 U.S.C. § 3013):

For Offenses Committed By Individuals On Or After April 24, 1996:

(A) $100, if convicted of a felony;
(B) $25, if convicted of a Class A misdemeanor;
(C) $10, if convicted of a Class B misdemeanor;
(D) $5, if convicted of a Class C misdemeanor or an infraction.

For Offenses Committed By Individuals On Or After November 18, 1988 But Prior To April 24, 1996:

(E) $50, if convicted of a felony;
(F) $25, if convicted of a Class A misdemeanor;
(G) $10, if convicted of a Class B misdemeanor;

(H) $5, if convicted of a Class C misdemeanor or an infraction.

For Offenses Committed By Individuals Prior To November 18, 1988:

(I) $50, if convicted of a felony;
(J) $25, if convicted of a misdemeanor.

3. A special assessment is required by statute for each count of conviction.

Background: Section 3013 of Title 18, United States Code, added by The Victims of Crimes Act of 1984, Pub. L. No. 98-473, Title II, Chap. XIV, requires courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation.".

The Commentary to §8E1.1 captioned "Background" is amended by deleting the entire text as follows:

"Background: Pursuant to 18 U.S.C. § 3013(a), the court is required to impose assessments in the following amounts:

$50, if the organization is convicted of a Class B misdemeanor;
$125, if the organization is convicted of a Class A misdemeanor; and
$200, if the organization is convicted of a felony. 18 U.S.C. § 3013.

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

and inserting in lieu thereof the following:

"Application Notes:

1. This guideline applies if the defendant is an organization. It does not apply if the defendant is an individual. See §5E1.3 for special assessments applicable to individuals.

2. The following special assessments are provided by statute (see 18 U.S.C. § 3013):

For Offenses Committed By Organizations On Or After April 24, 1996:

(A) $400, if convicted of a felony;
(B) $125, if convicted of a Class A misdemeanor;
(C) $50, if convicted of a Class B misdemeanor; or
(D) $25, if convicted of a Class C misdemeanor or an infraction.

For Offenses Committed By Organizations On Or After November 18, 1988 But Prior To April 24, 1996:

(E) $200, if convicted of a felony;

(F) $125, if convicted of a Class A misdemeanor;
(G) $50, if convicted of a Class B misdemeanor; or
(H) $25, if convicted of a Class C misdemeanor or an infraction.

For Offenses Committed By Organizations Prior To November 18, 1988:

(I) $200, if convicted of a felony;
(J) $100, if convicted of a misdemeanor.

3. A special assessment is required by statute for each count of conviction.

Background: Section 3013 of Title 18, United States Code, added by The Victims of Crimes Act of 1984, Pub. L. No. 98-473, Title II, Chap. XIV, requires courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation.".

Reason for Amendment: This amendment conforms §§5E1.3 (Special Assessments) and 8E1.1 (Special Assessments - Organizations) to changes made by section 210 of the Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132, 110 Stat. 1240, and section 601(r)(4) of Pub. L. 104-294, 110 Stat. 3502. As amended, the felony assessments for offenses committed after April 24, 1996, are raised to $100 for individuals and $400 for organizations.

Effective Date: The effective date of this amendment is November 1, 1997.

574. Amendment: Section 6A1.1 is amended by deleting "(c)(1)" and inserting in lieu thereof "(b)(1)".

The Commentary to 6A1.1 is amended by deleting "(c)(1)" and inserting in lieu thereof "(b)(1)".

Section 6A1.2 is amended by deleting "See Model Local Rule for Guideline Sentencing prepared by the Probation Committee of the Judicial Conference (August 1987)." and insert in lieu thereof "Rule 32(b)(6), Fed. R. Crim. P.".

The Commentary to §6A1.2 captioned "Application Note" is amended in Note 1 by deleting "111 S. Ct. 2182" and inserting in lieu thereof "501 U.S. 129, 135-39".

The Commentary to §6A1.2 captioned "Background" is amended by inserting "in writing" after "respond"; and by deleting:

"The potential complexity of factors important to the sentencing determination normally requires that the position of the parties be presented in writing. However, because courts differ greatly with respect to their reliance on written plea agreements and with respect to the feasibility of written statements under guidelines, district courts are encouraged to consider the approach that is most appropriate under local conditions. The Commission intends to reexamine this issue in light of experience under the guidelines.",

and inserting in lieu thereof "Rule 32(b)(6)(B), Fed. R. Crim. P.".

Section 6A1.3(a) is amended in the second sentence by deleting "reasonable" before "dispute".

Section 6A1.3(b) is amended by inserting "at a sentencing hearing" after "factors"; by deleting "(a)(1)" and inserting in lieu thereof "(c)(1)"; and by deleting "(effective Nov. 1, 1987), notify

the parties of its tentative findings and provide a reasonable opportunity for the submission of oral written objections before imposition of sentence.".

The Commentary to §6A1.3 is amended in the first paragraph by deleting "will no longer exist" and inserting in lieu thereof "no longer exists"; by deleting "will usually have" and inserting in lieu thereof "usually has";

and by deleting:

> "Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979) cert. denied, 444 U.S. 1073 (1980). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.",

and inserting in lieu thereof:

> " Although lengthy sentencing hearings seldom should be necessary, disputes about sentencing factors must be resolved with care. When a dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. See, e.g., United States v. Ibanez, 924 F.2d 427 (2d Cir. 1991). An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See, e.g., United States v. Jimenez Martinez, 83 F.3d 488, 494-95 (1st Cir. 1996) (finding error in district court's denial of defendant's motion for evidentiary hearing given questionable reliability of affidavit on which the district court relied at sentencing); United States v. Roberts, 14 F.3d 502, 521(10th Cir. 1993) (remanding because district court did not hold evidentiary hearing to address defendants' objections to drug quantity determination or make requisite findings of fact regarding drug quantity); see also, United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.".

The Commentary to §6A1.3 is amended by deleting:

> " In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. 18 U.S.C. § 3661. Any information may

be considered, so long as it has 'sufficient indicia of reliability to support its probable accuracy.' United States v. Marshall, 519 F. Supp. 751 (E.D. Wis. 1981), aff'd, 719 F.2d 887 (7th Cir. 1983); United States v. Fatico, 579 F.2d 707 (2d Cir. 1978) cert. denied, 444 U.S. 1073 (1980). Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered 'where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means.' United States v. Fatico, 579 F.2d at 713. Unreliable allegations shall not be considered. United States v. Weston, 448 F.2d 626 (9th Cir. 1971) cert. denied, 404 U.S. 1061 (1972).",

and inserting in lieu thereof:

" In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. See 18 U.S.C. § 3661; see also United States v. Watts, 117 U.S. 633, 635 (1997) (holding that lower evidentiary standard at sentencing permits sentencing court's consideration of acquitted conduct); Witte v. United States, 515 U.S. 389, 399-401 (1995) (noting that sentencing courts have traditionally considered wide range of information without the procedural protections of a criminal trial, including information concerning criminal conduct that may be the subject of a subsequent prosecution); Nichols v. United States, 511 U.S. 738, 747-48 (1994) (noting that district courts have traditionally considered defendant's prior criminal conduct even when the conduct did not result in a conviction). Any information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy. Watts, 117 U.S. at 637; Nichols, 511 U.S. at 748; United States v. Zuleta-Alvarez, 922 F.2d 33 (1st Cir. 1990), cert. denied, 500 U.S. 927 (1991); United States v. Beaulieu, 893 F.2d 1177 (10th Cir.), cert. denied, 497 U.S. 1038 (1990). Reliable hearsay evidence may be considered. United States v. Petty, 982 F.2d 1365 (9th Cir. 1993), cert. denied, 510 U.S. 1040 (1994); United States v. Sciarrino, 884 F.2d 95 (3d Cir.), cert. denied, 493 U.S. 997 (1989). Out-of-court declarations by an unidentified informant may be considered where there is good cause for the non-disclosure of the informant's identity and there is sufficient corroboration by other means. United States v. Rogers, 1 F.3d 341 (5th Cir. 1993); see also United States v. Young, 981 F.2d 180 (5th Cir.), cert. denied, 508 U.S. 980 (1993); United States v. Fatico, 579 F.2d 707, 713 (2d Cir. 1978), cert. denied, 444 U.S. 1073 (1980). Unreliable allegations shall not be considered. United States v. Ortiz, 993 F.2d 204 (10th Cir. 1993).".

The Commentary to §6A1.3 is amended by deleting:

" If sentencing factors are the subject of reasonable dispute, the court should, where appropriate, notify the parties of its tentative findings and afford an opportunity for correction of oversight or error before sentence is imposed.".

Reason for Amendment: This amendment makes a number of technical and conforming changes to the policy statements in Chapter Six, Part A (Sentencing Procedures) to reflect changes in Rule 32, Fed. R. Crim. P. and updates the case law references in the commentary to §6A1.3 to include references to sentencing guideline cases.

Effective Date: The effective date of this amendment is November 1, 1997.

575. Amendment: Appendix A (Statutory Index) is amended by inserting, in the appropriate place by title and section:

"18 U.S.C. § 514	2F1.1";
"18 U.S.C. § 611	2H2.1";
"18 U.S.C. § 669	2B1.1";
"18 U.S.C. § 758	2A2.4";
"18 U.S.C. § 1030(a)(7)	2B3.2";
"18 U.S.C. § 1035	2F1.1";
"18 U.S.C. § 1347	2F1.1";
"18 U.S.C. § 1518	2J1.2";
"18 U.S.C. § 1831	2B1.1";
"18 U.S.C. § 1832	2B1.1";
"18 U.S.C. § 2261A	2A6.2";
"21 U.S.C. § 841(b)(7)	2D1.1";
"21 U.S.C. § 960(d)(7)	2D1.11";
"47 U.S.C. § 223(a)(1)(C)	2A6.1";
"47 U.S.C. § 223(a)(1)(D)	2A6.1";
"47 U.S.C. § 223(a)(1)(E)	2A6.1";
"49 U.S.C. § 5124	2Q1.2";
"49 U.S.C. § 32703	2N3.1";
"49 U.S.C. § 32704	2N3.1";
"49 U.S.C. § 32705	2N3.1";
"49 U.S.C. § 32709(b)	2N3.1";
"49 U.S.C. § 60123(d)	2B1.3";
"49 U.S.C. § 80116	2F1.1";
"49 U.S.C. § 80501	2B1.3";

in the line referenced to "15 U.S.C. § 1281" by inserting "(for offenses committed prior to July 5, 1994)" immediately after "2B1.3";

in the line referenced to "15 U.S.C. § 1983" by inserting "(for offenses committed prior to July 5, 1994)" immediately after "2N3.1";

in the line referenced to "15 U.S.C. § 1984" by inserting "(for offenses committed prior to July 5, 1994)" immediately after "2N3.1";

in the line referenced to "15 U.S.C. § 1985" by inserting "(for offenses committed prior to July 5, 1994)" immediately after "2N3.1";

in the line referenced to "15 U.S.C. § 1986" by inserting "(for offenses committed prior to July 5, 1994)" immediately after "2N3.1";

in the line referenced to "15 U.S.C. § 1987" by inserting "(for offenses committed prior to July 5, 1994)" immediately after "2N3.1";

in the line referenced to "15 U.S.C. § 1988" by inserting "(for offenses committed prior to July 5, 1994)" immediately after "2N3.1";

in the line referenced to "15 U.S.C. § 1990c" by inserting "(for offenses committed prior to July 5, 1994)" immediately after "2N3.1";

by deleting "18 U.S.C. § 1008 2F1.1, 2S1.3";

in the line referenced to "18 U.S.C. § 1030(a)(2)" by deleting "2F1.1" and inserting in lieu thereof "2B1.1";

in the line referenced to "18 U.S.C. § 1030(a)(3)" by deleting "2F1.1" and inserting in lieu thereof "2B2.3";

in the line referenced to "18 U.S.C. § 1030(a)(5)" by deleting "2F1.1" and inserting in lieu thereof "2B1.3";

by deleting:

"18 U.S.C. § 2258(a), (b) 2G2.1, 2G2.2",

and inserting in lieu thereof:

"18 U.S.C. § 2260 2G2.1, 2G2.2";

in the line referenced to "18 U.S.C. § 2261" by deleting "2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.4, 2A4.1, 2B3.1, 2B3.2, 2K1.4" and inserting in lieu thereof "2A6.2";

in the line referenced to "18 U.S.C. § 2262" by deleting "2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.4, 2A4.1, 2B3.1, 2B3.2, 2K1.4" and inserting in lieu thereof "2A6.2";

in the line referenced to "21 U.S.C. § 959" by inserting ", 2D1.11" immediately after "2D1.1".

in the line referenced to "49 U.S.C. § 121" by inserting "(for offenses committed prior to July 5, 1994)" immediately after "2F1.1";

in the line referenced to "49 U.S.C. § 1809(b)" by inserting "(for offenses committed prior to July 5, 1994)" immediately after "2Q1.2";

in the line referenced to "49 U.S.C. App. § 1687(g)" by inserting "(for offenses committed prior to July 5, 1994)" immediately after "2B1.3"; and

by deleting "49 U.S.C. § 14904 2B4.1".

The Commentary to §2G2.1 captioned "Statutory Provisions" is amended by deleting "2258(a), (b)" and inserting in lieu thereof "2260".

The Commentary to §2G2.2 captioned "Statutory Provisions" is amended by deleting "2258(a), (b)" and inserting in lieu thereof "2260".

Section 2K2.1(a)(3) is amended by inserting "felony" before "prior".

Reason for Amendment: This amendment makes Appendix A (Statutory Index) more comprehensive. This amendment adds references for additional offenses, including offenses created by recently enacted legislation. In addition, this amendment revises Appendix A to conform to the revision of existing statutes and to reflect the codification of Title 49, United States Code. This amendment also corrects clerical errors in §§2G2.1 and 2G2.2.

Finally, this amendment corrects a clerical error in §2K2.1(a)(3), as amended by amendment 522, effective November 1, 1995. During the execution of that amendment, which equalized offense levels for semiautomatic assault weapon possession with machinegun possession, the word "felony" was inadvertently omitted from the phrase "prior conviction" in subsection (a)(3).

Effective Date: The effective date of this amendment is November 1, 1997.