

- "(6) If the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24."

The Commentary to §2F1.1 captioned "Statutory Provisions" is amended by deleting "290" and inserting in lieu thereof "289".

The Commentary to §2F1.1 captioned "Application Notes" is amended by inserting the following additional notes:

- "14. 'Financial institution,' as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 215, 656-657, 1005-1008, 1014, and 1344; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. 'Union or employee pension fund' and 'any health, medical, or hospital insurance association,' as used above, primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.
15. An offense shall be deemed to have 'substantially jeopardized the safety and soundness of a financial institution' if as a consequence of the offense the institution became insolvent, substantially reduced benefits to pensioners or insureds, was unable on demand to refund fully any deposit, payment or investment, or was so depleted of its assets as to be forced to merge with another institution in order to continue active operations."

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

- " Subsection (b)(6) implements, in a broader form, the statutory directive to the Commission in Section 961(m) of Public Law 101-73."

This amendment implements, in a broader form, the following statutory directive in Section 961(m) of Public Law 101-73: "Pursuant to section 994 of title 28, United States Code, and section 21 of the Sentencing Act of 1987, the United States Sentencing Commission shall promulgate guidelines, or amend existing guidelines, to provide for a substantial period of incarceration for a violation of, or a conspiracy to violate, section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of title 18, United States Code, that substantially jeopardizes the safety and soundness of a federally insured financial institution." In addition, this amendment deletes an incorrect statutory provision in the Commentary to §2B4.1, and deletes a reference to a petty offense in the Commentary to §2F1.1 that was inadvertently retained when other references to petty offenses were deleted. **The effective date of this amendment is November 1, 1990.**

318. The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the subdivision of the "Drug Equivalency Tables" captioned "Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)" by inserting the following additional entry as the seventh entry: "1 gm of Methamphetamine (Pure) = 50 gm of cocaine/10 gm of heroin".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the subdivision of the "Drug Equivalency Tables" captioned "Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)" in the twelfth (formerly eleventh) entry by deleting "0.418 gm" and inserting in lieu thereof "0.416 gm".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the subdivision of the "Drug Equivalency Tables" captioned "Schedule IV Substances" by deleting the sixth entry as follows:

"1 gm of Mephobarbital = 0.125 mg of heroin/0.125 gm of marihuana".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 11 by inserting "in the table below" immediately before "to estimate"; by deleting "Bufotenine at 1 mg per dose = 100 mg of Bufotenine" and inserting in lieu thereof "Mescaline at 500 mg per dose = 50 gms of mescaline"; and by deleting "common controlled substances" and inserting in lieu thereof "certain controlled substances. Do not use this table if any more reliable estimate of the total weight is available from case-specific information".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 11 by deleting the following from the table captioned "Typical Weight Per Unit (Dose, Pill, or Capsule) Table":

|                        |          |
|------------------------|----------|
| "Bufotenine            | 1 mg     |
| Diethyltryptamine      | 60 mg    |
| Dimethyltryptamine     | 50 mg",  |
| "Barbiturates          | 100 mg   |
| Glutethimide (Doriden) | 500 mg", |
| "Thiobarbital          | 50 mg";  |

by inserting an asterisk immediately after each of the following:

"LSD (Lysergic acid diethylamide)", "MDA", "PCP", "Psilocin", "Psilocybin", "2,5-Dimethoxy-4-methylamphetamine (STP, DOM)", "Methaqualone", "Amphetamine", "Methamphetamine", "Phenmetrazine (Preludin)";

and by inserting the following at the end:

"\*For controlled substances marked with an asterisk, the weight per unit shown is the weight of the actual controlled substance, and not generally the weight of the mixture or substance containing the controlled substance. Therefore, use of this table provides a very conservative estimate of the total weight."

This amendment provides an additional equivalency to reflect the distinction between methamphetamine and pure methamphetamine in the Drug Quantity Table at §2D1.1(c), corrects an error in the equivalency for Phenylacetone/P<sub>2</sub>P, and deletes a duplicate listing for Mephobarbital.

In addition, this amendment clarifies that the "Typical Weight Per Unit Table" in Note 11 of the Commentary to §2D1.1 is not to be used where a more reliable estimate of the weight of the mixture or substance containing the controlled substance is available from case-specific information. This amendment also clarifies that for certain controlled substances this table provides an estimate of the weight of the actual controlled substance, not necessarily the weight of the mixture or substance containing the controlled substance, and therefore use of this table in such cases will provide a very conservative estimate. Finally, this amendment deletes listings for several controlled substances that are generally legitimately manufactured and then unlawfully diverted; in such cases, more accurate weight estimates can be obtained from other sources (e.g., from the Drug Enforcement Administration or the manufacturer). **The effective date of this amendment is November 1, 1990.**

319. Section 2D1.2(a)(1) is amended by inserting "applicable to the quantity of controlled substances directly involving a protected location or an underage or pregnant individual" immediately following "§2D1.1".

Section §2D1.2(a) is amended by renumbering subdivisions (2) and (3) as (3) and (4), respectively; and by inserting the following as subdivision (2):

- "(2) 1 plus the offense level from §2D1.1 applicable to the total quantity of controlled substances involved in the offense; or".

The Commentary to §2D1.2 is amended by inserting, immediately before "Background", the following:

"Application Note:

1. Where only part of the relevant offense conduct directly involved a protected location or an underage or pregnant individual, subsections (a)(1) and (a)(2) may result in different offense levels. For example, if the defendant, as part of the same course of conduct or common scheme or plan, sold 5 grams of heroin near a protected location and 10 grams of heroin elsewhere, the offense level from subsection (a)(1) would be level 16 (2 plus the offense level for the sale of 5 grams of heroin, the amount sold near the protected location); the offense level from subsection (a)(2) would be level 17 (1 plus the offense level for the sale of 15 grams of heroin, the total amount of heroin involved in the offense)."

This amendment provides for the determination of the offense level in cases in which only part of the relevant offense conduct involves a protected location or an underage or pregnant individual. **The effective date of this amendment is November 1, 1990.**

320. Section 2D1.6 is amended by deleting "12" and inserting in lieu thereof: "the offense level applicable to the underlying offense."

The Commentary to §2D1.6 is amended by inserting, immediately before "Background", the following:

"Application Note:

1. Where the offense level for the underlying offense is to be determined by reference to §2D1.1, see Application Note 12 of the Commentary to §2D1.1, and Application Notes 1 and 2 of the Commentary to §2D1.4, for guidance in determining the scale of the offense. Note that the Drug Quantity Table in §2D1.1 provides a minimum offense level of 12 where the offense involves heroin (or other Schedule I or II Opiates), cocaine (or other Schedule I or II Stimulants), cocaine base, PCP, Methamphetamine, LSD (or other Schedule I or II Hallucinogens), Fentanyl, or Fentanyl Analogue (§2D1.1(c)(16)); and a minimum offense level of 6 otherwise (§2D1.1(c)(19))."

This amendment is designed to reduce unwarranted disparity by requiring consideration in the guideline of the amount of the controlled substance involved in the offense, thus conforming this guideline section to the structure of §§2D1.1, 2D1.2, 2D1.4, and 2D1.5. The statute to which this guideline applies (21 U.S.C. § 843(b)) prohibits the use of a communications facility to commit, cause, or facilitate a felony controlled substance offense. Frequently, a conviction under this statute is the result of a plea bargain because the statute has a low maximum (four years with no prior felony drug conviction; eight years with a prior felony drug conviction) and no mandatory minimum. The current guideline has a base offense level of 12 and no specific offense characteristics. Therefore, the scale of the underlying drug offense is not reflected in the guideline. This results in a departure from the guideline range frequently being warranted. Without guidance as to whether or how far to depart, the potential for unwarranted disparity is substantial. Under this amendment, the guideline itself will take into account the scale of the underlying offense. **The effective date of this amendment is November 1, 1990.**

321. Section 2D2.1(a)(1) is amended by deleting "or an analogue of these" and inserting in lieu thereof "an analogue of these, or cocaine base".

This amendment specifies the appropriate offense level for possession of cocaine base ("crack") in cases not covered by the enhanced penalties created by section 6371 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1990.**

322. Section 2G1.1(c)(1) is amended by deleting "involves" and inserting in lieu thereof "involved".

The Commentary to §2G1.1 captioned "Application Notes" is amended in Note 3 by inserting at the end:

"This factor would apply, for example, where the ability of the person being transported to appraise or control conduct was substantially impaired by drugs or alcohol. In the case of transportation involving an adult, rather than a minor, this characteristic generally will not apply where the alcohol or drug was voluntarily taken."

The Commentary to §2G1.1 captioned "Application Notes" is amended in Note 5 by deleting ", distinct offense, even if several persons are transported in a single act" and inserting in lieu thereof:

"victim. Consequently, multiple counts involving the transportation of different persons are not to be grouped together under §3D1.2 (Groups of Closely-Related Counts). Special instruction (c)(1) directs that if the relevant conduct of an offense of conviction includes more than one person being transported, whether specifically cited in the count of conviction or not, each such person shall be treated as if contained in a separate count of conviction".

This amendment clarifies the application of this guideline and corrects a clerical error. **The effective date of this amendment is November 1, 1990.**

323. Section 2G1.2(c)(1) is amended by deleting "involves" and inserting in lieu thereof "involved".

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

"(d) Cross Reference

- (1) If the offense involved the defendant causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production)."

The Commentary to §2G1.2 captioned "Statutory Provisions" is amended by deleting "§ 2423" and inserting in lieu thereof "§§ 2421, 2422, 2423".

The Commentary to §2G1.2 captioned "Application Notes" is amended in Note 1 by deleting ", distinct offense, even if several persons are transported in a single act" and inserting in lieu thereof:

"victim. Consequently, multiple counts involving the transportation of different persons are not to be grouped together under §3D1.2 (Groups of Closely-Related Counts). Special instruction (c)(1) directs that if the relevant conduct of an offense of conviction includes more than one person being transported, whether specifically cited in the count of conviction or not, each such person shall be treated as if contained in a separate count of conviction".

The Commentary to §2G1.2 captioned "Application Notes" is amended in Note 3 by inserting the following at the end:

"This factor would apply, for example, where the ability of the person being transported to appraise or control conduct was substantially impaired by drugs or alcohol."

The Commentary to §2G1.2 captioned "Application Notes" is amended by inserting the following additional notes:

- "4. 'Sexually explicit conduct,' as used in this guideline, has the meaning set forth in 18 U.S.C. § 2256.

5. The cross reference in (d)(1) is to be construed broadly to include all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct."

This amendment clarifies the application of this guideline and corrects a clerical error. In addition, a cross reference to §2G2.1 is inserted where the offense involves conduct that is more appropriately covered by that guideline to provide an offense level that more appropriately reflects the seriousness of such conduct. **The effective date of this amendment is November 1, 1990.**

324. Section 2G2.1 is amended in the title by inserting "; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production" immediately following "Printed Material".

Section 2G2.1 is amended by deleting:

- "(1) If the minor was under the age of twelve years, increase by 2 levels.";

and inserting in lieu thereof:

- "(1) If the offense involved a minor under the age of twelve years, increase by 4 levels; otherwise, if the offense involved a minor under the age of sixteen years, increase by 2 levels.
- (2) If the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.
- (c) Special Instruction
- (1) If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction.";

and by deleting "Characteristic" and inserting in lieu thereof "Characteristics".

The Commentary to §2G2.1 captioned "Statutory Provisions" is amended by deleting "8 U.S.C. § 1328;" and by inserting "(a), (b), (c)(1)(B)" immediately following "18 U.S.C. § 2251".

The Commentary to §2G2.1 captioned "Application Notes" is amended in Note 1 by inserting at the end:

"Special instruction (c)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction."

The Commentary to §2G2.1 captioned "Application Note" is amended by inserting the following additional notes:

- "2. Specific offense characteristic (b)(2) is intended to have broad application and includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, 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."

This amendment revises subsection (b)(1) to provide distinctions for the age of the victim consistent with §2G1.2, and adds subsection (b)(2) to provide an increase for defendants who abuse a position of trust in exploiting minor children. A special instruction is added to conform the operation of the multiple count rule in this guideline with §§2G1.1 and 2G1.2. A revision to the statutory provisions removes 8 U.S.C. § 1328; such offenses are now brought under this guideline by the cross reference appearing in §2G1.2. In addition, the reference in the statutory provisions to 18 U.S.C. § 2251 is made specific to the appropriate subsections. **The effective date of this amendment is November 1, 1990.**

325. Section 2G2.2 is amended by inserting the following at the end:

- " (3) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.
- (c) Cross Reference
- (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) if the resulting offense level is greater than that determined above."

The Commentary to §2G2.2 captioned "Statutory Provision" is amended by deleting "Provision" and inserting in lieu thereof "Provisions"; and by inserting "§ 1460, 2251(c)(1)(A)," immediately before "2252".

The Commentary to §2G2.2 captioned "Application Note" is amended by inserting the following additional notes:

- "2. 'Sexually explicit conduct,' as used in this guideline, has the meaning set forth in 18 U.S.C. § 2256.
3. The cross reference in (c)(1) is to be construed broadly to include all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.
4. If the defendant sexually abused a minor at any time, whether or not such sexual abuse occurred during the course of the offense, an upward departure is warranted. In determining the extent of such a departure, the court should take into consideration the offense levels provided in §§2A3.1, 2A3.2, and 2A3.4 most commensurate with the defendant's conduct.";

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

This amendment provides a specific offense characteristic for materials involving depictions of sadistic or masochistic conduct or other violence, and a cross reference for offenses more appropriately treated under §2G2.1. It also provides Commentary recommending consideration of an upward departure in cases in which the defendant has sexually abused a minor at any time, whether or not such sexual abuse occurred during the course of the instant offense. In addition, it inserts a statutory provision indicating the applicability of this guideline to violations of 18 U.S.C. § 2251(c)(1)(A). **The effective date of this amendment is November 1, 1990.**

326. Section 2G3.1(b)(2) is amended by deleting "sodomasochistic" and inserting in lieu thereof "sadistic or masochistic".

Section 2G3.1(c) is amended by deleting:

- "(1) If the offense involved a criminal enterprise, apply the appropriate guideline from Chapter Two, Part E (Offenses Involving Criminal Enterprises and Racketeering) if the resulting offense level is greater than that determined above.",

and inserting in lieu thereof:

- "(1) If the offense involved transporting, distributing, receiving, possessing, or advertising to receive material involving the sexual exploitation of a minor, apply §2G2.2 (Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor)."

This amendment inserts a cross reference to §2G2.2 for offenses involving materials which, in fact, depict children to ensure that the penalties for such offenses adequately reflect their seriousness. The current cross reference at subsection (c)(1) is deleted. In addition, the amendment conforms the terminology of specific offense characteristic (b)(2) to that used in other offense guidelines. **The effective date of this amendment is November 1, 1990.**

327. Section 2H1.1 is amended in the title by inserting "Conspiracy to Interfere with Civil Rights;" immediately before "Going".

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)".

This amendment consolidates two guidelines and raises the minimum base offense level from level 13 to level 15 for cases currently covered under §2H1.2 to better reflect the seriousness of this offense. **The effective date of this amendment is November 1, 1990.**

328. The Commentary to §2H1.5 captioned "Statutory Provisions" is amended by deleting "Provisions" and inserting in lieu thereof "Provision"; and by deleting "; 42 U.S.C. § 3631".

The Commentary to §2H1.5 captioned "Application Notes" is amended by deleting Note 3 as follows:

- "3. In the case of a violation of 42 U.S.C. § 3631, apply this guideline where the offense did not involve the threat or use of force. If the offense involved the threat or use of force, apply §2H1.3."

This amendment deletes references to a statute to which this guideline does not apply. **The effective date of this amendment is November 1, 1990.**

329. Section 2J1.6 is amended by deleting:

- "(a) Base Offense Level: 6
- (b) Specific Offense Characteristics
  - (1) If the underlying offense is punishable by death or imprisonment for a term of fifteen years or more, increase by 9 levels.
  - (2) If the underlying offense is punishable by a term of imprisonment of five or more years, but less than fifteen years, increase by 6 levels.
  - (3) If the underlying offense is a felony punishable by a maximum term of less than five years, increase by 3 levels."

and inserting in lieu thereof:

- "(a) Base Offense Level:
  - (1) 11, if the offense constituted a failure to report for service of sentence; or
  - (2) 6, otherwise.



- (b) Specific Offense Characteristics
- (1) If the base offense level is determined under subsection (a)(1), and the defendant --
- (A) voluntarily surrendered within 96 hours of the time he was originally scheduled to report, decrease by 5 levels; or
- (B) was ordered to report to a community corrections center, community treatment center, 'halfway house,' or similar facility, and subdivision (A) above does not apply, decrease by 2 levels.
- Provided, however, that this reduction shall not apply if the defendant, while away from the facility, committed any federal, state, or local offense punishable by a term of imprisonment of one year or more.*
- (2) If the base offense level is determined under subsection (a)(2), and the underlying offense is --
- (A) punishable by death or imprisonment for a term of fifteen years or more, increase by 9 levels; or
- (B) punishable by a term of imprisonment of five years or more, but less than fifteen years, increase by 6 levels; or
- (C) a felony punishable by a term of imprisonment of less than five years, increase by 3 levels."

The Commentary to §2J1.6 captioned "Background" is amended by deleting "The offense level for this offense" and inserting in lieu thereof "Where the base offense level is determined under subsection (a)(2), the offense level".

This amendment provides greater differentiation in the guideline offense levels for the various types of conduct covered by this guideline. **The effective date of this amendment is November 1, 1990.**

330. 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).

This amendment restructures this guideline to provide more appropriate offense levels for the conduct covered. The Commission has determined that the offense levels provided in the current guideline do not adequately reflect the seriousness of the offenses that are covered under this section. **The effective date of this amendment is November 1, 1990.**

331. Section 2K1.6(a) is amended by deleting "greater" and inserting in lieu thereof "greatest"; and by inserting the following additional subdivision:

"(3) If death resulted, apply the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide)."

Section 2K1.6(a)(2) is amended by deleting the period at the end and inserting in lieu thereof "; or".

This amendment adds an additional alternative base offense level to cover the situation in which the commission of this offense results in death. **The effective date of this amendment is November 1, 1990.**

332. Section 2K1.7 is amended by inserting "(a)" immediately before "If"; and by inserting the following additional subsection:

"(b) Special Instruction for Fines

- (1) Where there is a federal conviction for the underlying offense, the fine guideline shall be the fine guideline that would have been applicable had there only been a conviction for the underlying offense. This guideline shall be used as a consolidated fine guideline for both the underlying offense and the conviction underlying this section."

The Commentary to §2K1.7 captioned "Application Notes" is amended by inserting the following additional notes:

- "3. Where a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for the use of fire or explosives is not to be applied in respect to the guideline for the underlying offense.
4. Subsection (b) sets forth special provisions concerning the imposition of fines. Where there is also a conviction for the underlying offense, a consolidated fine guideline is determined by the offense level that would have applied to the underlying offense absent a conviction under 18 U.S.C. § 844(h). This is required because the offense level for the underlying offense may be reduced in that any specific offense characteristic for use of fire or explosives would not be applied (see Application Note 3). The Commission has not established a fine guideline range for the unusual case in which there is no conviction for the underlying offense, although a fine is authorized under 18 U.S.C. § 3571."

The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 4 in the third sentence by inserting "required" immediately before "because"; and by inserting ", although a fine is authorized under 18 U.S.C. § 3571" immediately before the period at the end of the last sentence.

This amendment conforms §2K1.7 to §2K2.4, which includes specific instructions concerning treatment of fines and double counting. Both sections are based upon similarly written statutes that provide for a fixed mandatory, consecutive sentence of imprisonment. In addition, Application Note 4 of the Commentary to §2K2.4 is revised and expanded for greater clarity. **The effective date of this amendment is November 1, 1990.**

333. Section 2K2.1(a)(1) is amended by deleting "16" and inserting in lieu thereof "18".

Section 2K2.1(b)(1) is amended by inserting ", other than a firearm covered in 26 U.S.C. § 5845(a)," immediately following "ammunition".

Section 2K2.2(a)(1) is amended by deleting "16" and inserting in lieu thereof "18".

This amendment provides that the reduction in offense level under subsection (b)(1) for possession of a weapon for sporting purposes or collection may not be applied in the case of any weapon described in 26 U.S.C. § 5845(a). In addition, the amendment increases the base offense level in subsection (a)(1) of §§2K2.1 and 2K2.2 from 16 to 18 to better reflect the seriousness of the conduct covered. **The effective date of this amendment is November 1, 1990.**

334. Chapter Two, Part K, Subpart 3 is amended by inserting an additional guideline with accompanying commentary as §2K3.2 (Feloniously Mailing Injurious Articles).

This amendment adds an additional guideline covering the felony provisions of 18 U.S.C. § 1716. **The effective date of this amendment is November 1, 1990.**

335. Section 2L1.1(b)(1) is amended by deleting "and without knowledge that the alien was excludable under 8 U.S.C. §§ 1182(a)(27), (28), (29)," immediately before "decrease".

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

- "7. 8 U.S.C. §§ 1182(a)(27), (a)(28), and (a)(29) concern certain aliens who are excludable because they are subversives.",

and inserting in lieu thereof:

- "7. Where the defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, an upward departure may be warranted."

The Commentary to §2L1.1 captioned "Background" is amended in the second sentence by deleting "and did not know the alien was excludable as a subversive" immediately following "profit".

This amendment deletes a portion of specific offense characteristic (b)(1) that is unclear in application, and in any event rarely occurs, and replaces it with an application note indicating that an upward departure may be warranted in the circumstances specified. **The effective date of this amendment is November 1, 1990.**

336. Section 2M4.1(b)(1) is amended by deleting "while" and inserting in lieu thereof "at a time when"; and by deleting "into the armed services, other than in time of war or armed conflict" and inserting in lieu thereof "for compulsory military service".

The Commentary to §2M4.1 captioned "Application Notes" is amended by deleting:

- "1. 'While persons were being inducted into the armed services' means at a time of compulsory military service under the Selective Service laws.  
2. The Commission has not considered the appropriate sanction for this offense when persons are being inducted during time of war or armed conflict.",

and inserting in lieu thereof:

- "1. Subsection (b)(1) does not distinguish between whether the offense was committed in peacetime or during time of war or armed conflict. If the offense was committed when persons were being inducted for compulsory military service during time of war or armed conflict, an upward departure may be warranted.";

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

This amendment clarifies this guideline and deletes language that produced the anomalous result of a lower offense level for failure to register and evasion of military service in time of war or armed conflict than during a peacetime draft. In addition, the amendment makes a technical correction to the language of the guideline that enables the elimination of current Application Note 1. **The effective date of this amendment is November 1, 1990.**

337. Section 2M5.2 is amended by deleting:

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

- (1) 22, if sophisticated weaponry was involved; or
- (2) 14."

and inserting in lieu thereof:

"(a) Base Offense Level:

- (1) 22, except as provided in subdivision (2) below;
- (2) 14, if the offense involved only non-fully-automatic small arms (rifles, handguns, or shotguns), and the number of weapons did not exceed ten."

The Commentary to §2M5.2 captioned "Statutory Provision" is amended by deleting "Provision" and inserting in lieu thereof "Provisions", and by deleting "§ 2778" and inserting in lieu thereof "§§ 2778, 2780".

The Commentary to §2M5.2 captioned "Application Notes" is amended in Note 1 by inserting, immediately before "In the case of a violation", the following:

"Under 22 U.S.C. § 2778, the President is authorized, through a licensing system administered by the Department of State, to control exports of defense articles and defense services that he deems critical to a security or foreign policy interest of the United States. The items subject to control constitute the United States Munitions List, which is set out in 22 C.F.R. Part 121.1. Included in this list are such things as military aircraft, helicopters, artillery, shells, missiles, rockets, bombs, vessels of war, explosives, military and space electronics, and certain firearms.

The base offense level assumes that the offense conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States. In the unusual case where the offense conduct posed no such risk, a downward departure may be warranted."

The Commentary to §2M5.2 captioned "Application Notes" is amended in the first sentence of Note 2 by inserting "or foreign policy" immediately before "interest".

This amendment revises this guideline to better distinguish the more and less serious forms of offense conduct covered. **The effective date of this amendment is November 1, 1990.**

338. Section 2N1.1 is amended by inserting the following additional subsection:

"(b) Cross Reference

- (1) If the offense involved extortion, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above."

This amendment adds a cross reference to ensure that in the case of an offense involving extortion, the offense level will not be lower than that under §2B3.2. **The effective date of this amendment is November 1, 1990.**

339. Section 2N1.2 is amended by deleting:

- "(a) Base Offense Level (Apply the greater):
  - (1) 16;
  - (2) If the offense involved extortion, apply §2B3.2."

and inserting in lieu thereof:

- "(a) Base Offense Level: 16
- (b) Cross Reference
  - (1) If the offense involved extortion, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage)."

The Commentary to §2N1.2 captioned "Application Notes" is amended by deleting Note 1 as follows:

- "1. If the offense involved extortion, apply the guideline from §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) rather than the guideline from this section."

by renumbering Note 2 as Note 1; and in the caption by deleting "Notes" and inserting in lieu thereof "Note".

This amendment conforms the structure of this guideline to that used in other guidelines. No substantive change results. **The effective date of this amendment is November 1, 1990.**

340. The Commentary to §2N2.1 captioned "Statutory Provisions" is amended by inserting "(a)(1), (a)(2), (b)" immediately after "333".

The Commentary to §2N2.1 captioned "Application Notes" is amended by inserting the following additional note:

- "4. The Commission has not promulgated a guideline for violations of 21 U.S.C. § 333(e) (offenses involving anabolic steroids)."

This amendment provides that §2N2.1 does not apply to convictions under 21 U.S.C. § 333(e). **The effective date of this amendment is November 1, 1990.**

341. Section 2P1.1(b)(2) is amended by inserting the following at the end:

*"Provided, however, that this reduction shall not apply if the defendant, while away from the facility, committed any federal, state, or local offense punishable by a term of imprisonment of one year or more."*

Section 2P1.1(b) is amended by renumbering subdivision (3) as (4); and by inserting the following as subdivision (3):

- "(3) If the defendant escaped from the non-secure custody of a community corrections center, community treatment center, 'halfway house,' or similar facility, and subsection (b)(2) is not applicable, decrease the offense level under subsection (a)(1) by 4 levels or the

offense level under subsection (a)(2) by 2 levels. *Provided*, however, that this reduction shall not apply if the defendant, while away from the facility, committed any federal, state, or local offense punishable by a term of imprisonment of one year or more."

The Commentary to §2P1.1 captioned "Application Notes" is amended in Note 3 by deleting "§2P1.1(b)(3)" and inserting in lieu thereof "subsection (b)(4)".

The Commentary to §2P1.1 captioned "Application Notes" is amended by inserting the following additional note:

- "5. Criminal history points under Chapter Four, Part A (Criminal History) are to be determined independently of the application of this guideline. For example, in the case of a defendant serving a one-year sentence of imprisonment at the time of the escape, criminal history points from §4A1.1(b) (for the sentence being served at the time of the escape), §4A1.1(d) (custody status), and §4A1.1(e) (recency) would be applicable."

This amendment provides greater differentiation in the guideline offense levels for the various types of conduct covered by this guideline. In addition, it clarifies that, where the instant offense is escape, criminal history points from §4A1.1(d) or (e), or both, may be applicable and that the addition of such points does not constitute unintended double counting. **The effective date of this amendment is November 1, 1990.**

342. The Introductory Commentary to Chapter Two, Part S, is deleted in its entirety as follows:

"Introductory Commentary

Money laundering activities are essential to the operation of organized crime. Congress recently enacted new statutes prohibiting these activities and increased the maximum penalties.

The guidelines provide substantially increased punishments for these offenses. In fiscal year 1985, the time served by defendants convicted of felonies involving monetary transaction reporting under 31 U.S.C. §§ 5313, 5316, and 5322 averaged about ten months, and only a few defendants served as much as four to five years. However, courts have been imposing higher sentences as they come to appreciate the seriousness of this activity, and sentences as long as thirty-five years have been reported. Specifically, Congress made all reporting violations felonies in 1984, and enacted the Money Laundering Control Act of 1986 (18 U.S.C. §§ 1956, 1957), which creates new offenses and provides higher maximum sentences when knowledge, facilitation or concealment of serious criminal activity is proved."

This amendment deletes the introductory commentary to this part as outdated, inconsistent with the commentaries to other sections, and better covered in the individual commentaries to the offenses contained in the part. **The effective date of this amendment is November 1, 1990.**

343. The Commentary to §2T1.1 captioned "Application Notes" is amended in Note 5 by deleting:

"'racketeering activity' as defined in 18 U.S.C. § 1961. If §2T1.1(b)(1) applies, do not apply §4B1.3 (Criminal Livelihood), which is substantially duplicative",

and inserting in lieu thereof:

"conduct constituting a criminal offense under federal, state, or local law".

The Commentary to §2T1.2 captioned "Application Notes" is amended in Note 1 by deleting:

"'racketeering activity' as defined in 18 U.S.C. § 1961. If §2T1.2(b)(1) applies, do not apply §4B1.3 (Criminal Livelihood), which is substantially duplicative",

and inserting in lieu thereof:

"conduct constituting a criminal offense under federal, state, or local law".

The Commentary to §2T1.3 captioned "Application Notes" is amended in Note 1 by deleting:

"'racketeering activity' as defined in 18 U.S.C. § 1961. If §2T1.3(b)(1) applies, do not apply §4B1.3 (Criminal Livelihood), which is substantially duplicative",

and inserting in lieu thereof:

"conduct constituting a criminal offense under federal, state, or local law".

The Commentary to §2T1.4 captioned "Application Notes" is amended in Note 1 by deleting the last sentence as follows:

"If this subsection applies, do not apply §4B1.3 (Criminal Livelihood) which is substantially duplicative."

This amendment deletes the portion of these application notes concerning application of §4B1.3 (Criminal Livelihood) because this commentary conflicts with the principle expressed in Application Note 5 of the Commentary to §1B1.1 (when two guideline provisions are equally applicable, the one producing the greater offense level controls). In addition, this amendment broadens the definition of "criminal activity" to cover any criminal violation of federal, state, or local law. **The effective date of this amendment is November 1, 1990.**

344. The Introductory Commentary to Chapter Three, Part A is amended by deleting the second sentence as follows: "They are to be treated as specific offense characteristics."

The Commentary to §3A1.1 (Vulnerable Victim) captioned "Application Notes" is amended in Note 2 by inserting the following at the end:

"For example, where the offense guideline provides an enhancement for the age of the victim, this guideline should not be applied unless the victim was unusually vulnerable for reasons unrelated to age."

This amendment clarifies the application of §3A1.1, and eliminates an unnecessary and confusing sentence in the introductory commentary to this part. **The effective date of this amendment is November 1, 1990.**

345. The Introductory Commentary to Chapter Three, Part B, is amended by beginning a new paragraph with the second sentence; and by inserting, immediately after the first sentence, the following:

"The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct), i.e., all conduct included under §1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction. However, where the defendant has received mitigation by virtue of being convicted of an offense significantly less serious than his actual criminal conduct, e.g., the defendant is convicted of unlawful possession of a controlled substance but his actual conduct involved drug trafficking, a further reduction in the offense level under §3B1.2 (Mitigating Role) ordinarily is not warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense."

This amendment clarifies the conduct that is relevant to the determination of Chapter Three, Part B, and clarifies the operation of §3B1.2 in certain cases. **The effective date of this amendment is November 1, 1990.**



346. Section 3B1.3 is amended in the second sentence by deleting "in addition to that provided for in §3B1.1, nor may it be employed" immediately following "may not be employed"; and by inserting the following additional sentence at the end:

"If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under §3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under §3B1.1 (Aggravating Role).".

This amendment provides that the enhancement for abuse of a position of trust may apply in addition to an enhancement for an aggravating role under §3B1.1. **The effective date of this amendment is November 1, 1990.**

347. Section 3C1.1 is amended in the title by deleting "Willfully Obstructing or Impeding Proceedings" and inserting in lieu thereof "Obstructing or Impeding the Administration of Justice".

Section 3C1.1 is amended by deleting "impeded or obstructed, or attempted to impede or obstruct" and inserting in lieu thereof "obstructed or impeded, or attempted to obstruct or impede,"; and by deleting "or prosecution" and inserting in lieu thereof ", prosecution, or sentencing".

The Commentary to §3C1.1 is amended by deleting the introductory paragraph immediately before "Application Notes" as follows:

" This section provides a sentence enhancement for a defendant who engages in conduct calculated to mislead or deceive authorities or those involved in a judicial proceeding, or otherwise to willfully interfere with the disposition of criminal charges, in respect to the instant offense."

The Commentary to §3C1.1 captioned "Application Notes" is amended by deleting Notes 1-4 as follows:

- "1. The following conduct, while not exclusive, may provide a basis for applying this adjustment:
  - (a) destroying or concealing material evidence, or attempting to do so;
  - (b) directing or procuring another person to destroy or conceal material evidence, or attempting to do so;
  - (c) testifying untruthfully or suborning untruthful testimony concerning a material fact, or producing or attempting to produce an altered, forged, or counterfeit document or record during a preliminary or grand jury proceeding, trial, sentencing proceeding, or any other judicial proceeding;
  - (d) threatening, intimidating, or otherwise unlawfully attempting to influence a co-defendant, witness, or juror, directly or indirectly;
  - (e) furnishing material falsehoods to a probation officer in the course of a presentence or other investigation for the court.
2. In applying this provision, suspect testimony and statements should be evaluated in a light most favorable to the defendant.
3. This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt is not a basis for application of this provision.
4. Where the defendant is convicted for an offense covered by §2J1.1 (Contempt), §2J1.2 (Obstruction of Justice), §2J1.3 (Perjury), §2J1.8 (Bribery of Witness), or §2J1.9 (Payment to Witness), this adjustment is not to be applied to the offense level for that

offense except where a significant further obstruction occurred during the investigation or prosecution of the obstruction offense itself (e.g., where the defendant threatened a witness during the course of the prosecution for the obstruction offense). Where the defendant is convicted both of the obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of §3D1.2 (Groups of Closely-Related Counts). The offense level for that Group of Closely-Related Counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.",

and inserting in lieu thereof:

- "1. This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision, the defendant's testimony and statements should be evaluated in a light most favorable to the defendant.
2. Obstructive conduct can vary widely in nature, degree of planning, and seriousness. Application Note 3 sets forth examples of the types of conduct to which this enhancement is intended to apply. Application Note 4 sets forth examples of less serious forms of conduct to which this enhancement is not intended to apply, but that ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range. Although the conduct to which this enhancement applies is not subject to precise definition, comparison of the examples set forth in Application Notes 3 and 4 should assist the court in determining whether application of this enhancement is warranted in a particular case.
3. The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:
  - (a) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;
  - (b) committing, suborning, or attempting to suborn perjury;
  - (c) producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;
  - (d) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;
  - (e) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;
  - (f) providing materially false information to a judge or magistrate;
  - (g) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;

- (h) providing materially false information to a probation officer in respect to a presentence or other investigation for the court;
- (i) conduct prohibited by 18 U.S.C. §§ 1501-1516.

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).

This amendment clarifies the operation of §3C1.1 and inserts an additional guideline to address reckless endangerment during flight. The Commission believes that reckless endangerment during flight is sufficiently different from other forms of obstructive conduct to warrant a separate enhancement. **The effective date of this amendment is November 1, 1990.**

348. Section 3D1.1 is amended by inserting "(a)" immediately before "When"; by deleting "(a)", "(b)", and "(c)", and inserting in lieu thereof "(1)", "(2)", and "(3)" respectively; and by inserting the following additional subsection:

- "(b) Any count for which the statute mandates imposition of a consecutive sentence is excluded from the operation of §§3D1.2-3D1.5. Sentences for such counts are governed by the provisions of §5G1.2(a)."

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

"Certain offenses, e.g., 18 U.S.C. § 924(c) (use of a deadly or dangerous weapon in relation to a crime of violence or drug trafficking) by law carry mandatory consecutive sentences. Such offenses are exempted from the operation of these rules. See §3D1.2.",

and inserting in lieu thereof:

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

Section 3D1.2 is amended by deleting the second sentence as follows:

"A count for which the statute mandates imposition of a consecutive sentence is excluded from such Groups for purposes of §§3D1.2-3D1.5."

The Commentary to §3D1.2 captioned "Application Notes" is amended by deleting Note 1 as follows:

- "1. Counts for which the statute mandates imposition of a consecutive sentence are excepted from application of the multiple count rules. Convictions under such counts are excluded from the determination of the combined offense level. Convictions for 18 U.S.C. § 924(c) (use of firearm in commission of a crime of violence) provide a common example. Note that such a conviction usually does affect the offense level for other counts, however, in that in the event of such a conviction the specific offense characteristic for weapon use in the primary offense is to be disregarded. See Commentary to §2K2.4. Example: The defendant is convicted of one count of bank robbery in which he took \$5,000 and discharged a weapon causing permanent bodily injury (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The two counts are not grouped together, but the offense level for the bank robbery count is 28 (18 + 4 + 6) rather than 31. The mandatory five year sentence on the weapon-use count runs consecutively, as required by law."

This amendment consolidates the provisions dealing with statutorily required consecutive sentences in §3D1.1 for greater clarity. **The effective date of this amendment is November 1, 1990.**

349. Section 3D1.2(b) is amended by deleting, immediately following "common scheme or plan", the following:

", including, but not limited to:

- (1) A count charging conspiracy or solicitation and a count charging any substantive offense that was the sole object of the conspiracy or solicitation. 28 U.S.C. § 994(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."

This amendment clarifies the operation of §3D1.2(b), makes editorial improvements in §3D1.2(d), makes the listing of offenses in §3D1.2(d) more comprehensive, clarifies the interaction of §§ 3D1.2(d) and 3D1.3(b), and clarifies the Commentary of §3D1.2 by making explicit that offenses such as multiple robberies do not fit within the parameters of §3D1.2(b). **The effective date of this amendment is November 1, 1990.**

350. Section 3D1.4 is amended in the fourth line of the Unit table by inserting "2 1/2-" immediately before "3" the first time "3" appears; and in the fifth line of the Unit table by deleting "4 or" and inserting in lieu thereof "3 1/2-".

Section 3D1.4 is amended by deleting:

- "(d) Except when the total number of Units is 1 1/2, round up to the next large whole number."

The Commentary to §3D1.4 captioned "Background" is amended in the first paragraph by deleting the fifth sentence as follows:

- "When this approach produces a fraction in the total Units, other than 1 1/2, it is rounded up to the nearest whole number."

The "Illustrations of the Operation of the Multiple-Count Rules" following §3D1.5 are amended in example 1 in the third sentence by deleting "18" and "4-" and inserting in lieu thereof "20" and "2-" respectively; and in the sixth sentence by deleting "(rounded up to 3)" immediately following "2 1/2 Units".

The "Illustrations of the Operation of the Multiple-Count Rules" following §3D1.5 are amended in example 3 in the sixth sentence by deleting "Obstruction" and inserting in lieu thereof "Obstructing or Impeding the Administration of Justice".

This amendment simplifies the operation of §3D1.4. In addition, the amendment conforms the illustrations of the operation of the multiple-count rules. **The effective date of this amendment is November 1, 1990.**

351. The Commentary to §3E1.1 captioned "Application Notes" is amended by deleting:

- "2. Conviction by trial does not preclude a defendant from consideration under this section. A defendant may manifest sincere contrition even if he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct).
3. A guilty plea may provide some evidence of the defendant's acceptance of responsibility. However, it does not, by itself, entitle a defendant to a reduced sentence under this section."

and inserting in lieu thereof:

- "2. This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does

not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

3. Entry of a plea of guilty prior to the commencement of trial combined with truthful admission of involvement in the offense and related conduct will constitute significant evidence of acceptance of responsibility for the purposes of this section. However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility."

The Commentary to §3E1.1 captioned "Application Notes" is amended in Note 4 in the first sentence by deleting "Willfully Obstructing or Impeding Proceedings" and inserting in lieu thereof "Obstructing or Impeding the Administration of Justice".

The Commentary to §3E1.1 captioned "Application Notes" is amended in Note 5 in the second sentence by deleting "and should not be disturbed unless it is without foundation" immediately following "review".

The Commentary to §3E1.1 captioned "Background" is amended in the first paragraph in the second sentence by inserting "and related conduct" immediately before "by taking"; and in the third sentence by deleting "lesser sentence" and inserting in lieu thereof "lower offense level", and by deleting "sincere remorse" and inserting in lieu thereof "acceptance of responsibility".

The Commentary to §3E1.1 captioned "Background" is amended by deleting the second paragraph as follows:

" The availability of a reduction under §3E1.1 is not controlled by whether the conviction was by trial or plea of guilty. Although a guilty plea may show some evidence of acceptance of responsibility, it does not automatically entitle the defendant to a sentencing adjustment."

This amendment clarifies the operation of this guideline and conforms the title of a reference to another guideline. **The effective date of this amendment is November 1, 1990.**

352. Section 4A1.2(a)(3) is amended by inserting "or execution" immediately following "imposition".

Section 4A1.2(c)(1) is amended by inserting in the appropriate place by alphabetical order:

"Careless or reckless driving",  
"Insufficient funds check".

Section 4A1.2(c)(1) is amended by inserting "(excluding local ordinance violations that are also criminal offenses under state law)" immediately following "Local ordinance violations".

Section 4A1.2(c)(2) is amended by inserting "(e.g., speeding)" immediately following "minor traffic infractions".

The Commentary to §4A1.2 captioned "Application Notes" is amended by inserting the following additional notes:

- "12. Local ordinance violations. A number of local jurisdictions have enacted ordinances covering certain offenses (e.g., larceny and assault misdemeanors) that are also violations of state criminal law. This enables a local court (e.g., a municipal court) to exercise jurisdiction over such offenses. Such offenses are excluded from the definition

of local ordinance violations in §4A1.2(c)(1) and, therefore, sentences for such offenses are to be treated as if the defendant had been convicted under state law.

13. Insufficient funds check. 'Insufficient funds check,' as used in §4A1.2(c)(1), does not include any conviction establishing that the defendant used a false name or non-existent account."

This amendment clarifies that, for the purpose of computing criminal history points, there is no difference between the suspension of the "imposition" and "execution" of a prior sentence. This amendment also makes the provisions of §4A1.2(c)(1) more comprehensive in respect to certain vehicular offenses and clarifies the application of §4A1.2(c)(1) in respect to certain offenses prosecuted in municipal courts. In addition, this amendment expands the coverage of §4A1.2(c)(1) to include a misdemeanor or petty offense conviction for an insufficient funds check. **The effective date of this amendment is November 1, 1990.**

353. The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 6 by deleting:

"Any other sentence resulting in a valid conviction is to be counted in the criminal history score. Convictions which the defendant shows to have been constitutionally invalid may not be counted in the criminal history score. Also, if to count an uncounseled misdemeanor conviction would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution, then such conviction shall not be counted in the criminal history score. Nonetheless, any conviction that is not counted in the criminal history score may be considered pursuant to §4A1.3 if it provides reliable evidence of past criminal activity."

and inserting in lieu thereof:

"Also, sentences resulting from convictions that a defendant shows to have been previously ruled constitutionally invalid are not to be counted. Nonetheless, the criminal conduct underlying any conviction that is not counted in the criminal history score may be considered pursuant to §4A1.3 (Adequacy of Criminal History Category)."

The Commentary to §4A1.2 captioned "Application Notes" is amended in the caption of Note 6 by deleting "Invalid" and inserting in lieu thereof "Reversed, Vacated, or Invalidated".

The Commentary to §4A1.2 is amended by inserting at the end:

Background: Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.

The Commission leaves for court determination the issue of whether a defendant may collaterally attack at sentencing a prior conviction."

This amendment clarifies the circumstances under which prior sentences are excluded from the criminal history score. In particular, the amendment clarifies the Commission's intent regarding the counting of uncounseled misdemeanor convictions for which counsel constitutionally is not required because the defendant was not imprisoned. Lack of clarity regarding whether these prior sentences are to be counted may result not only in considerable disparity in guideline application, but also in the criminal history score not adequately reflecting the defendant's failure to learn from the application of previous sanctions and his potential for recidivism. This amendment expressly states the Commission's position that such convictions are to be counted for the purposes of criminal history under Chapter Four, Part A. **The effective date of this amendment is November 1, 1990.**

354. The Commentary to §4B1.3 captioned "Application Notes" is amended in Note 2 by deleting "(currently 2,000x the hourly minimum wage under federal law is \$6,700)" immediately following "then existing hourly minimum wage under federal law".



This amendment deletes a reference to the federal minimum wage that is now outdated. **The effective date of this amendment is November 1, 1990.**

355. Chapter Four, Part B, is amended by inserting an additional guideline with accompanying commentary as §4B1.4 (Armed Career Criminal).

This amendment adds a new section to address cases subject to a sentence enhancement under 18 U.S.C. § 924(e). **The effective date of this amendment is November 1, 1990.**

356. Section 5E1.2 is amended by deleting:

"(a) Except as provided in subsection (f) below, the court shall impose a fine in all cases.",

and inserting in lieu thereof:

"(a) The court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine."

Section 5E1.2(d)(2) is amended by deleting "the ability of the defendant" and inserting in lieu thereof "any evidence presented as to the defendant's ability".

The Commentary to §5E1.2 captioned "Application Notes" is amended in Note 3 by deleting the fourth sentence as follows:

"In many cases, circumstances will make it unnecessary to consider these standards other than in the most general terms.";

and by inserting the following additional paragraphs at the end:

"Where it is readily ascertainable that the defendant cannot, and is not likely to become able to, pay a fine greater than the maximum fine set forth in Column B of the Fine Table in subsection (c)(3), calculation of the alternative maximum fines under subsections (c)(2)(B) (twice the gross pecuniary loss caused by the offense) and (c)(2)(C) (three times the gross pecuniary gain to all participants in the offense) is unnecessary. In such cases, a statement that 'the alternative maximums of the fine table were not calculated because it is readily ascertainable that the defendant cannot, and is not likely to become able to, pay a fine greater than the maximum set forth in the fine table' is recommended in lieu of such calculations.

The determination of the fine guideline range may be dispensed with entirely upon a court determination of present and future inability to pay any fine. The inability of a defendant to post bail bond (having otherwise been determined eligible for release) and the fact that a defendant is represented by (or was determined eligible for) assigned counsel are significant indicators of present inability to pay any fine. In conjunction with other factors, they may also indicate that the defendant is not likely to become able to pay any fine."

This amendment clarifies the operation of this guideline. **The effective date of this amendment is November 1, 1990.**

357. The Introductory Commentary to Chapter Five, Part H is amended by inserting the following additional paragraph at the end:

" In addition, 28 U.S.C. § 994(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."

This amendment clarifies the relationship of 28 U.S.C. § 994(e) to certain of the policy statements contained in this part. **The effective date of this amendment is November 1, 1990.**

358. Chapter Five, Part K, Subpart 2, is amended in the title by deleting "GENERAL PROVISIONS:" and inserting in lieu thereof "OTHER GROUNDS FOR DEPARTURE".

Section 5K2.0 is amended in the first sentence of the first paragraph by inserting a comma immediately following "degree", and by inserting "that should result in a sentence different from that described" immediately following "the guidelines"; in the third sentence of the first paragraph by deleting "court at the time of sentencing" and inserting in lieu thereof "courts"; in the fourth sentence of the first paragraph by deleting "the present section" and inserting in lieu thereof "this subpart", by deleting "fully" immediately before "take", by inserting "fully" immediately following "account", and by deleting "precise" and inserting in lieu thereof "the"; in the sixth sentence of the first paragraph by deleting "judge" and inserting in lieu thereof "court"; and in the seventh sentence of the first paragraph by deleting "listed elsewhere in the guidelines (e.g., as an adjustment or specific offense characteristic)" and inserting in lieu thereof "taken into consideration in the guidelines (e.g., as a specific offense characteristic or other adjustment)".

Section 5K2.0 is amended in the first sentence of the second paragraph by inserting ", for example," immediately following "Where", by deleting "guidelines, specific offense characteristics," and inserting in lieu thereof "offense guideline", by deleting "part" and inserting in lieu thereof "subpart", by deleting "guideline" and inserting in lieu thereof "applicable guideline range", and by deleting "of conviction" immediately following "the offense"; in the second sentence of the second paragraph by deleting "offense of conviction" and inserting in lieu thereof "applicable offense guideline"; in the third sentence of the second paragraph by deleting "offense of conviction is theft" and inserting in lieu thereof "theft offense guideline is applicable", by deleting "when" immediately before "the theft", and by inserting "range" immediately before "more readily"; and in the fourth sentence of the second paragraph by deleting "offense of conviction is robbery" and inserting in lieu thereof "robbery offense guideline is applicable", and by deleting "sentence" immediately before "adjustment".

Section 5K2.0 is amended by deleting the fourth paragraph as follows:

"Harms identified as a possible basis for departure from the guidelines should be taken into account only when they are relevant to the offense of conviction, within the limitations set forth in §1B1.3."

This amendment makes various editorial and clarifying changes. In addition, the last paragraph is deleted as unclear and overly restrictive. **The effective date of this amendment is November 1, 1990.**

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

|                     |                              |
|---------------------|------------------------------|
| "7 U.S.C. § 1361    | 2Q1.2",                      |
| "18 U.S.C. § 34     | 2A1.1, 2A1.2, 2A1.3, 2A1.4", |
| "18 U.S.C. § 35(b)  | 2A6.1",                      |
| "18 U.S.C. § 219    | 2C1.3",                      |
| "18 U.S.C. § 281    | 2C1.3",                      |
| "18 U.S.C. § 332    | 2B1.1, 2F1.1",               |
| "18 U.S.C. § 335    | 2F1.1",                      |
| "18 U.S.C. § 608    | 2H2.1",                      |
| "18 U.S.C. § 647    | 2B1.1",                      |
| "18 U.S.C. § 650    | 2B1.1",                      |
| "18 U.S.C. § 665(b) | 2B3.3, 2C1.1",               |
| "18 U.S.C. § 667    | 2B1.1, 2B1.2",               |
| "18 U.S.C. § 712    | 2F1.1",                      |
| "18 U.S.C. § 753    | 2P1.1",                      |
| "18 U.S.C. § 915    | 2F1.1",                      |

|   |                              |
|---|------------------------------|
| "18 U.S.C. § 917                              | 2F1.1",                      |
| "18 U.S.C. § 970(a)                           | 2B1.3, 2K1.4",               |
| "18 U.S.C. § 1015                             | 2F1.1, 2J1.3, 2L2.1, 2L2.2", |
| "18 U.S.C. § 1023                             | 2B1.1, 2F1.1",               |
| "18 U.S.C. § 1024                             | 2B1.2",                      |
| "18 U.S.C. § 1031                             | 2F1.1",                      |
| "18 U.S.C. § 1091                             | 2H1.3",                      |
| "18 U.S.C. § 1115                             | 2A1.4",                      |
| "18 U.S.C. § 1167                             | 2B1.1",                      |
| "18 U.S.C. § 1168                             | 2B1.1",                      |
| "18 U.S.C. § 1201(c), (d)                     | 2X1.1",                      |
| "18 U.S.C. § 1364                             | 2K1.4",                      |
| "18 U.S.C. § 1422                             | 2C1.2, 2F1.1",               |
| "18 U.S.C. § 1541                             | 2L2.3",                      |
| "18 U.S.C. § 1716<br>(felony provisions only) | 2K3.2",                      |
| "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,<br>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".

This amendment makes the statutory index more comprehensive, conforms it to amended guidelines, and corrects erroneous references. In addition, this amendment conforms the statutory provisions of §§ 2D3.4, 2T2.2, 2X2.1 to the statutory index, and inserts additional Commentary in §2M6.2 referencing a statutory provision contained in Appendix A (Statutory Index) to conform the format of this guideline to the format of other offense guidelines. **The effective date of this amendment is November 1, 1990.**

360. Section 1B1.10(d) is amended by deleting "and 269" and inserting in lieu thereof "269, 329, and 341".

This amendment implements the directive in 28 U.S.C. § 994(u) in respect to the guideline amendments effective November 1, 1990. **The effective date of this amendment is November 1, 1990.**

361. The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1 by inserting the following additional subdivision at the end:

"(k) 'Destructive device' means any article described in 18 U.S.C. § 921(a)(4) (including an explosive, incendiary, or poison gas - (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the proceeding clauses).".

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

'firearm'" and inserting in lieu thereof ", 'firearm,' and 'destructive device'", and by deleting the last sentence as follows: "'Destructive device' is defined in the Commentary to §2K1.4 (Arson: Property Damage by Use of Explosives).".

The Commentary to §2B1.2 captioned "Application Notes" is amended in Note 1 by deleting "and 'firearm'" and inserting in lieu thereof ", 'firearm,' and 'destructive device'", and by deleting the last sentence as follows: "'Destructive device' is defined in the Commentary to §2K1.4 (Arson: Property Damage by Use of Explosives).".

The Commentary to §2B2.1 captioned "Application Notes" is amended in Note 1 by inserting "'destructive device,'" immediately before "and 'dangerous weapon'", and by deleting the last sentence as follows: "'Destructive device' is defined in the Commentary to §2K1.4 (Arson: Property Damage by Use of Explosives).".

The Commentary to §2B2.2 captioned "Application Notes" is amended in Note 1 by deleting "and 'firearm'" and inserting in lieu thereof ", 'firearm,' 'destructive device,' and 'dangerous weapon'", and by deleting the last sentence as follows: "'Destructive device' is defined in the Commentary to §2K1.4 (Arson: Property Damage by Use of Explosives).".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 1 by inserting "'destructive device,'" immediately before "'dangerous weapon,'".

This amendment inserts the definition of a destructive device, formerly in the Commentary to §2K1.4, in the Commentary to §1B1.1, with minor revisions to the examples of the articles prohibited by 18 U.S.C. § 921(a)(4) to better reflect the statutory provision. This amendment also conforms the commentary of various offense guidelines to reference the definitions set forth in Application Note 1 of the Commentary to §1B1.1. **The effective date of this amendment is November 1, 1990.**

362. Chapter Seven is deleted in its entirety as follows:

"CHAPTER SEVEN - VIOLATIONS OF PROBATION AND  
SUPERVISED RELEASE

§7A1.1.        Reporting of Violations of Probation and Supervised Release (Policy Statement)

- (a)        The Probation Officer shall promptly report to the court any alleged violation of a condition of probation or supervised release that constitutes new criminal conduct, other than conduct that would constitute a petty offense.
- (b)        The Probation Officer shall promptly report to the court any other alleged violation of a condition of probation or supervised release, unless the officer determines: (1) that such violation is minor, not part of a continuing pattern of violation, and not indicative of a serious adjustment problem; and (2) that non-reporting will not present an undue risk to the public or be inconsistent with any directive of the court relative to the reporting of violations.

Commentary

This policy statement addresses the reporting of violations of probation and supervised release. It is the Commission's intent that significant violations be promptly reported to the court. At the same time, the Commission realizes that it would neither be practical nor desirable to require such reporting for every minor violation.

§7A1.2.        Revocation of Probation (Policy Statement)

- (a)        Upon a finding of a violation of probation involving new criminal



conduct, other than criminal conduct constituting a petty offense, the court shall revoke probation.

- (b) Upon a finding of a violation of probation involving conduct other than conduct under subsection (a), the court may: (1) revoke probation; or (2) extend the term of probation and/or modify the conditions of probation.

Commentary

This policy statement expresses a presumption that probation is to be revoked in the case of new criminal conduct other than a petty offense. For lesser violations, the policy statements provide that the court may revoke probation, extend the term of supervision, or modify the conditions of supervision.

§7A1.3.        Revocation of Supervised Release (Policy Statement)

- (a) Upon a finding of a violation of supervised release involving new criminal conduct, other than criminal conduct constituting a petty offense, the court shall revoke supervised release.
- (b) Upon a finding of a violation of supervised release involving conduct other than conduct under subsection (a), the court may: (1) revoke supervised release; or (2) extend the term of supervised release and/or modify the conditions of supervised release.

Commentary

This policy statement expresses a presumption that supervised release is to be revoked in the case of new criminal conduct other than a petty offense. For lesser violations, the policy statements provide that the court may revoke supervised release, extend the term of supervision, or modify the conditions of supervision.

§7A1.4.        No Credit for Time Under Supervision (Policy Statement)

- (a) Upon revocation of probation, no credit shall be given (toward any sentence of imprisonment imposed) for any portion of the term of probation served prior to revocation.
- (b) Upon revocation of supervised release, no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision.

Commentary

This policy statement provides that time served on probation or supervised release is not to be credited in the determination of any term of imprisonment imposed upon revocation."

A replacement chapter containing policy statements with accompanying commentary is inserted as Chapter Seven (Violations of Probation and Supervised Release).

This amendment replaces Chapter Seven with a set of more detailed policy statements applicable to violations of probation and supervised release. Under 28 U.S.C. § 994(a)(3), the Sentencing Commission is required to issue guidelines or policy statements applicable to the revocation of probation and supervised release. At this time, the Commission has chosen to promulgate policy statements only. These policy statements will provide guidance while allowing for the identification of any substantive or procedural issues that require further review. The Commission views these policy statements as evolutionary and will review relevant data and materials concerning revocation determinations under these policy statements. Revocation guidelines will be issued after federal judges, probation officers,

practitioners, and others have the opportunity to evaluate and comment on these policy statements. **The effective date of this amendment is November 1, 1990.**

363. 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."